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Retribution in a Modern Penal Law: The Principle of Aggravated Harm

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RETRIBUTION IN A MODERN PENAL LAW: THE PRINCIPLE OF AGGRAVATED HARM

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Surely to think of the apt expression of feeling—even if we call it moral indignation rather than revenge—as the ultimate justification *of punishment is to subordinate what is primary to what is ancillary. We do not live in society in order to condemn, though we may condemn in order to live.*[1]

Thus the old Gentleman ended his Harangue. The . . . [Legislature] heard it, and approved the Doctrine and immediately practised the contrary, just as if it had been a common Sermon. . . .[2]

I

On September 1, 1967, in the State of New York, the "first major and comprehensive revision of the Penal Law in the State of New York since 1881"[3] became effective.[4] While much has been written of the revised Penal Law,[5] one important aspect of it has received little

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1. H. L. A. HART, PUNISHMENT AND RESPONSIBILITY 172 (1968) (emphasis in original).

2. B. Franklin, *Preface to Poor Richard's Almanac,* in THE AMERICAN TRADITION IN LITERATURE 155 (3rd ed. 1967).

3. *Governor's Memorandum of Approval,* July 20, 1965, in McKINNEY'S CONSOLIDATED LAWS OF NEW YORK ANNOTATED, bk. 39, Penal Law at xxxv (1967). Although the Penal Law was passed by the Legislature and approved by the Governor in 1965 (N.Y. SESS. LAWS 1965, ch. 1030), "[i]n order to allow the judiciary and the legal fraternity and law enforcement agencies ample opportunity to study and familiarize themselves with the new law, the "Revised Penal Law" was accorded an effective date of September 1, 1967, more than two years subsequent to its enactment." *Memorandum of the Commission on Revision of the Penal Law and Criminal Code on the Penal Law, id.* at xxxi.

4. The revision of the Penal Law was largely the product of the New York Temporary Commission on Revision of the Penal Law and Criminal Code. The Commission was created by statute in 1961. N.Y. SESS. LAWS 1961, ch. 346, *amended by* N.Y. SESS. LAWS 1962, ch. 548. For an account of the history and operation of the Commission, see STATE OF NEW YORK TEMPORARY COMMISSION ON REVISION OF THE PENAL LAW AND CRIMINAL CODE: REPORTS 1962-1968, in particular, N.Y. LEG. DOC. No. 41, at 5-19 (1962) and *Memorandum of the Commission on Revision of the Penal Law and Criminal Code on the Penal Law, supra* note 3.

5. Of general interest are: STATE OF NEW YORK TEMPORARY COMMISSION ON REVISION OF THE PENAL LAW AND CRIMINAL CODE: REPORTS 1962-1968, *supra* note 4; *Commission Staff Notes on the Proposed New York Penal Law,* in PROPOSED PENAL LAW: NEW YORK DRAFT 251 (Edward Thompson Co. ed. 1964); *Symposium: New York's New Penal Law,* 18 BUFFALO L. REV. 211 (1968-1969); Gegan, *Criminal Homicide in the Revised N.Y. Penal Law,* 12 N.Y.L.F. 566 (1966); McKenna, *Survey of N.Y. Law: Criminal Law and Procedure,* 17 SYRACUSE L. REV. 158 (1965) & 19 SYRACUSE

attention. The drafters of the Penal Law, the State of New York Temporary Commission on Revision of the Penal Law and Criminal Code,[6] were charged[7] to "reappraise, in light of current knowledge and thinking, existing substantive provisions relating to sentencing, the imposing of penalties, and the theory of punishment relating to crime."[8] Although the sentencing provisions of the Penal Law have been discussed elsewhere,[9] the Commission's reappraisal of "the theory of punishment relating to crime," and how well the Penal Law reflects that reappraisal, has gone virtually unnoticed.

In examining the old Penal Law,[10]

> [t]he Commission found . . . [it] . . . to be anything but a cohesive, well-organized unit, permeated as it is with inconsistencies, ambiguities, inequities and archaisms. Instead of a modern set of guidelines to help effectuate the deterrence of crime and the segregation and reformation of criminals, the State of New York has a few modern procedures engrafted by amendment upon a structure designed for a retributive system.
>
> . . . .
>
> [S]eparate punishments were prescribed for each crime based upon an evaluation of the amount of retribution society should exact for the offense.[11]

This, to the Commission, was intolerable. It believed that a penal law retributively grounded ignores the tremendous expansion in knowledge of the past century that has resulted in "a growing realization that the sentencing of and confinement of convicted persons is not a simple matter of making the guilty pay for their offenses, . . . "[12] and runs

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L. REV. 271 (1968); Ploscowe, *Sex Offenses in the New Penal Law*, 32 BROOKLYN L. REV. 274 (1966); Sobel, *The Anticipatory Offenses in the New Penal Law: Solicitation, Conspiracy, Attempt and Facilitation*, 32 BROOKLYN L. REV 257 (1966); Suvero, *Drug Offenses and the New Penal Law*, 32 BROOKLYN L. REV. 287 (1966); Note, *The Proposed Penal Law of New York*, 64 COLUM. L. REV. 1469 (1964); Comment, *Affirmative Defenses Under New York's New Penal Law*, 19 SYRACUSE L. REV. 44 (1967).

6. Hereinafter referred to as the Commission.

7. The act creating and charging the Commission was N.Y. SESS. LAWS 1961, ch. 346, *as amended by* N.Y. SESS. LAWS 1962, ch. 548.

8. N.Y. SESS. LAWS 1961, ch. 346, *as amended by* N.Y. SESS. LAWS 1962, ch. 548, § 2(d).

9. *See* note 5 *supra;* Murrahs & Rubin, *Penal Reform and the Model Sentencing Act*, 65 COLUM. L. REV. 1167 (1965).

10. The "old" Penal Law is the Penal Law of 1909, [1909] Laws of New York, ch. 88.

11. STATE OF NEW YORK TEMPORARY COMMISSION ON REVISION OF THE PENAL LAW AND CRIMINAL CODE, INTERIM REPORT (February 1, 1963); N.Y. LEG. DOC. No. 8, at 27 (1963).

12. STATE OF NEW YORK TEMPORARY COMMISSION ON REVISION OF THE PENAL LAW AND CRIMINAL CODE, INTERIM REPORT (February 1, 1962); N.Y. LEG. DOC. No. 41, at 9 (1962).

the grave risk of losing the confidence and respect of the populace.[13] The Commission thus undertook as one of its primary tasks a "reappraisal of certain fundamental concepts and philosophies lying at the very roots of our penal system."[14] According to the Commission, this reappraisal resulted in "changes of a fundamental nature . . . in order to bring [the Penal Law] into step with modern sociological, psychological and penological thinking."[15]

The "fundamental changes" the Commission thought it had wrought in the Penal Law are summarized in the General Purposes Article of the Penal Law[16]—in particular, section 1.05 (5) which reads:

> The general purposes of the provisions of this chapter are:
> ....
> 5. To insure the public safety by preventing the commission of offenses through the deterrent influence of the sentences authorized, the rehabilitation of those convicted, and their confinement when required in the interests of public protection.

In short, the imposition of penal sanctions was to be justified on the basis of deterrence, rehabilitation and incapacitation. Retribution was rejected as a justification of punishment.[17]

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13. N.Y. LEG. DOC. No. 41, at 7-8.

14. *Id.* at 8.

15. *Memorandum of the Commission on Revision of the Penal Law and Criminal Code on the Penal Law, supra* note 3, at xxxii.

16. N.Y. PENAL LAW §§ 1.00-.05 (McKinney 1975).

17. N.Y. PENAL LAW § 1.05 (McKinney 1975) reads in its entirety:

§ 1.05 General Purposes.

The general purposes of the provisions of this chapter are:

1. To proscribe conduct which unjustifiably and inexcusably causes or threatens substantial harm to individual or public interests;

2. To give fair warning of the nature of the conduct proscribed and of the sentences authorized upon conviction;

3. To define the act or omission and the accompanying mental state which constitute each offense;

4. To differentiate on reasonable grounds between serious and minor offenses and to prescribe proportionate penalties therefor; and

5. To insure the public safety by preventing the commission of offenses through the deterrent influence of the sentences authorized, the rehabilitation of those convicted, and their confinement when required in the interests of public protection.

In discussions of the "purpose" or "justification" of a penal law or sanction, it must be borne in mind that "the problem . . . is one of the priority and relationship of purposes as well as of their legitimacy—of multivalued rather than single-valued thinking." Hart, *The Aims of the Criminal Law,* 23 LAW & CONTEMP. PROB. 401 (1958). For example, § 1.05 contains three distinct components, each of which can be further reduced to the elements that comprise that particular component. The purpose of the first component, consisting of §§ 1.05(1),(2)(the first clause), and (3), is "[t]o announce to society that these actions are not to be done and to secure that fewer of them are done." H. L. A. HART, *supra* note 1, at 6. The purpose of the second component of § 1.05, consisting of § 1.05(2)(the second clause), and (4) is to state what will be

Unfortunately, one cannot stop at this point,[18] confident that all

done to those who commit a proscribed act—they will receive an appropriate penalty. The purpose of the third component, consisting of § 1.05(5) is to justify the second; thus it is here that the question of justification of punishment is presented.

Furthermore, in discussing the justification of punishment, as Professor Hart has demonstrated so forcefully, one must distinguish the justification of a practice from the justification of the application of that practice in any particular case. This, of course, is Professor Hart's well known General Justifying Aim/Distribution terminology. *See* H. L. A. HART, *id.* at 8-13. Thus, it is not at all inconsistent to recognize that retribution may play a role in the distribution of punishment, *e.g.*, limiting punishment to an offender for his offense, *see* note 32 *infra*, notwithstanding that it is not relied on to justify the practice of punishment. Section 1.05(5)'s thrust seems to be directed toward denying retribution as a justification of the practice of punishment, and I will assume that to be the case for purposes of this article.

18. Examples of § 1.05 being taken at face value are not hard to find, although no purpose would be served by citing them. The process may have received its impetus from the Commission, in fact. In the *Commission Staff Notes on the Proposed New York Penal Law, supra* note 5, at 251, the Commission states that the purpose of the notes are to explain "major changes which would be effected by the proposed Penal Law . . . . " It is certainly not unreasonable to suppose, given the Commission's stated view on the retributive aspects of the old Penal Law, that it would think that § 1.05 contained "major changes" from the old Penal Law. *See* notes 10-15 *supra* & accompanying text. Yet, all the staff notes say of the section is that it "serves . . . to state, in broad terms, the salutory objectives . . . (the Penal Law) seeks to achieve . . . ." *Commission Staff Notes on the Proposed New York Penal Law, supra* note 5, at 251. Not everyone has accepted this section at face value, however. *See* the discriminating analysis of the Penal Law in Note, *supra* note 5. *See also* Murrahs & Rubin, *supra* note 9.

The New York courts have done as badly as the Commission—there has been no thorough discussion of the justification of penal sanctions by any New York court, either before or after the effective date of the present Penal Law, although quite a number of decisions touch on the topic. The leading case is People v. Oliver, 1 N.Y.2d 152, 134 N.E.2d 197, 151 N.Y.S.2d 367 (1956), where the court of appeals held that N.Y. Session Laws 1948, ch. 544, *amending* § 486 of the 1909 Penal Law (which had the effect of raising the age of competency from seven years to sixteen years, except for a fifteen year old who commits an act punishable by death or life imprisonment) was to be applied in all cases decided after the effective date of the enactment. In discussing the problem the court said:

> This application of statutes reducing punishment accords with the best modern theories concerning the functions of punishment in criminal law. According to these theories, the punishment or treatment of criminal offenders is directed toward one or more of three ends: (1) to discourage and act as a deterrent upon future criminal activity, (2) to confine the offender so that he may not harm society and (3) to correct and rehabilitate the offender. There is no place in the scheme for punishment for its own sake, the product simply of vengeance or retribution. . . . A legislative mitigation of the penalty for a particular crime represents a legislative judgment that the lesser penalty or the different treatment is sufficient to meet the legitimate ends of the criminal law. Nothing is to be gained by imposing the more severe penalty after such a pronouncement; the excess in punishment can, by hypothesis, serve no purpose other than to satisfy a desire for vengeance.

Id. at 160, 134 N.E.2d at 201-02, 151 N.Y.S.2d at 373.

Many decisions have echoed this language, but not one has elaborated. *See, e.g.*, People v. Warden, 30 App. Div. 2d 649, 291 N.Y.S.2d 200 (1st Dep't 1968); People v. Mosher, 24 App. Div. 2d 47, 263 N.Y.S.2d 765 (4th Dep't 1965); People v. Farr, 80 Misc. 2d 250, 253, 362 N.Y.S.2d 915, 918 (Sup. Ct. 1974); People *ex rel.* Carter v. Warden, 62 Misc. 2d 191, 308 N.Y.S.2d 552 (Sup. Ct. 1970). Still others have echoed the language of § 1.05, also without elaboration. *See, e.g.*, People v. Butler, 46 App. Div. 2d 422, 425, 362 N.Y.S.2d 658, 661 (4th Dep't 1975). *See also* the early case of People

traces of retributive punishment have been eliminated from the Penal Law.[19] In order to determine how effective the expungement has been,

v. Smith, 163 Misc. 469, 472, 297 N.Y.S. 489, 492 (Sup. Ct. 1937). No case could be found, however, containing a thorough treatment of justification of punishment. *But see* the interesting opinion of Justice Tilzer in People v. Corapi, 42 Misc. 2d 247, 247 N.Y.S.2d 609 (1st Dep't 1964).

There is an equally long line of cases, apparently stemming from People v. Silver, 10 App. Div. 2d 274, 199 N.Y.S.2d 254 (1st Dep't 1960), embracing the notion that a penal sentence should "encompass the community's condemnation of the defendant's misconduct . . . ." *Id.* at 276, 199 N.Y.S.2d at 256, *see, e.g.,* People v. Gittelson, 25 App. Div. 2d 265, 269, 268 N.Y.S.2d 779, 784 (1st Dep't 1966); People v. Cotter, 25 App. Div. 2d 609, 610, 267 N.Y.S.2d 679, 680 (4th Dep't 1966); People v. Burghardt, 17 App. Div. 2d 912, 233 N.Y.S.2d 60, 61 (4th Dep't 1962). None of the cases elaborate, though. Thus, it is unclear whether some form of retribution is being legitimized, or whether these courts are simply referring to the expressive function of the Penal Law (which is the use of punishment as "a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, on the part either of the punishing authority himself, or of those 'in whose name' the punishment is inflicted." J. FEINBERG, DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY 98 (1970). As Professor H. L. A. Hart points out, this treats "the expression of community's condemnation not as justification but as a defining feature of legal punishment." H. L. A. HART, *supra* note 1, at 263). Furthermore, the court of appeals has done little to clear the muddy waters. In large part this is due to its interpretation of § 543 of the Code of Criminal Procedure (now contained in Art. 450 and 470, CPL) and Art. 6, § 5 of the Constitution for the State of New York, to the effect that the court has "no power to review the appropriateness of a discretionary sentence." People v. Gittleson, 18 N.Y.2d 427, 430, 223 N.E.2d 14, 16, 276 N.Y.S.2d 596, 598 (1966), *quoting* People v. Speiser, 277 N.Y. 342, 344, 14 N.E.2d 380, 381 (1938). Thus, the court of appeals has had little opportunity to delve into the area.

On the other hand, at least one New York appellate case has openly embraced retribution as a justification for penal sanctions. In People v. Golden, 41 App. Div. 2d 242, 342 N.Y.S.2d 309 (1st Dep't 1973), a case decided after the Penal Law came into effect, in disposing of the defendant's claim that his sentence was excessive, the court stated: "The [sentencing] process must take into account several factors: the rehabilitative . . .; the incapacitative . . .; the deterrent effect . . .; and the vindictive, i.e., the measure of punishment to be inflicted upon the defendant by way of retribution for the transgression involved." *Id.* at 243-44, 342 N.Y.S.2d at 310. The court said it was relying on a retributive notion to justify the sentence in this case. *Id.* at 244, 342 N.Y.S.2d at 311. In reality, though, its actions belie its words. The court, in the exercise of its discretion to modify sentences, reduced the defendant's sentence from four concurrent one-year terms "to four concurrent periods of imprisonment, not to exceed thirty days each." *Id.* The case was apparently not appealed, and has not been cited, for any purpose, by any other court; nor did the court cite any authority supporting its view of retribution as a justification of penal sanctions.

19. The wisdom and morality of retributive punishment is a matter of much dispute. For a discussion of this issue, see note 123 *infra*. The debate is further complicated by the many ideas conveyed by the word "retribution." To many, retribution involves relating punishment for an offense to the moral culpability of the offender. *See, e.g.,* HEGEL, PHILOSOPHY OF RIGHT 69-71 (1942); I. KANT, THE METAPHYSICAL ASPECTS OF JUSTICE 100-110 (1965); Griffiths, *The Limits of Criminal Law Scholarship,* 79 YALE L.J. 1388, 1418-19 (1970). Others view retribution as providing revenge for harm done, a conception having its roots in the principle of *lex talionis. See, e.g.,* H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 37 (1968); Michael & Wechsler, *A Rationale of the Law of Homicide* II, 37 COLUM. L. REV., 1261, 1295 n.79 (1937). Still others view it as involving "the emphatic denunciation by the community of a crime." Lord Denning's testimony before the Royal Commission on Capital Punish-

analysis must proceed to the Penal Law's substantive provisions. Analysis of those provisions reveals that the Commission systematically employed a legislative principle of dubious merit, if retribution was to play no part, whereby offenses were graded into greater or lesser categories[20] based solely upon the harm resulting from a proscribed act.[21]

As an example of this principle of aggravated harm, compare sections 120.25,[22] 120.10 (3),[23] and 125.25 (2).[24] A close reading of these sections will show that they differ substantively only in the harm necessary to invoke them. If a person recklessly creates a grave risk

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ment, Cmd. 8932 para. 53, *quoted in* H. L. A. HART, *supra* note 1, at 170, 263. *See also* PACKER, *supra* at 44. This brief definitional treatment by no means adequately reflects the complexities of retribution. *See* H. L. A. HART, *supra* note 1, at 210-37; N. WALKER, THE AIM OF A PENAL SYSTEM (1966).

20. Section 70 of the New York Penal Law grades felonies into 5 classes (A to E), with the most serious felonies in class A and the least serious in class E. Section 70.15 creates an analogous scheme for misdemeanors. The significance of the classification of a felony lies in the permissible sentence. The scheme is one of decreasing severity, of both minimum and maximum sentence, from class A to class E. Thus, for one convicted of a class A felony, *e.g.*, Kidnapping in the 1st degree, the court must impose a maximum of life imprisonment and a minimum of between 15 and 25 years (this is complicated by the fact that class A felonies are themselves broken down into three categories, as exemplified in § 70(3)(a); this does not affect the maximum sentence but it does affect the minimum); for one convicted of a class E felony, *e.g.*, abortion in the second degree, the court must impose a maximum of between three and four years, without setting a minimum, or the court may impose a definite sentence of imprisonment of one year or less. *See generally* N.Y. PENAL LAW § 70.00 (McKinney 1975).

21. For purposes of this article, the word "act" will refer to the proscribed conduct, while "result" and "harm" will refer to the physical consequences of the act. I am using this definition solely out of convenience. For more elaborate, but for my purposes unnecessary, treatments of these definitional problems, see J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 171-246 (1960); G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART 1-29 (2d ed. 1961); Eser, *Harm in the Concept of Crime*, 4 DUQUESNE L. REV. 345 (1965-1966).

22. § 120.25 Reckless endangerment in the first degree.
A person is guilty of reckless endangerment in the first degree when, under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person.
Reckless endangerment in the first degree is a class D felony.

23. § 120.10 Assault in the first degree.
A person is guilty of assault in the first degree when:

. . . .

3. Under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes serious physical injury to another person; . . .
Assault in the first degree is a class C felony.

24. § 125.25 Murder in the second degree.
A person is guilty of murder in the second degree when:

. . . .

2. Under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person. . . .
Murder in the second degree is a class A-1 felony.

of death under circumstances evincing a depraved indifference to human life, but no harm to another results, he is guilty of reckless endangerment in the first degree—a class D felony. If he commits precisely the same act under apparently similar conditions, but it results in serious physical injury to another, he is guilty of assault in the first degree—a class C felony. If he commits precisely the same act under apparently similar conditions, but it results in death to another, he is guilty of murder in the second degree—a class A-1 felony. In other words, the maximum sentence an offender will be exposed to under these circumstances may vary from seven years to life,[25] apparently depending upon his good fortune and nothing else. If he is fortunate enough not to harm anyone, he can be imprisoned for no longer than seven years; but if he is unfortunate enough to kill, he can be imprisoned for life. Moreover, this example is not an isolated one; the principle of aggravated harm appears throughout the Penal Law, ranging over such diverse areas as assault,[26] burglary,[27] larceny,[28] felony-

25. *See* N.Y. PENAL LAW §§ 70(2)(a),(c), (d) (McKinney 1975). And this is quite apart from other consequences of importance. For example, not only do the maximum sentences vary dramatically, so do the minimum sentences. The minimum sentence for a class A-1 felony is 15 to 25 years, for a class C felony 0 to 5 years, and for a class D felony 0 to 2⅓ years. N.Y. PENAL LAW § 70.00(3). *See also* § 70.00(4) which restricts the use of a short definite term of imprisonment to one convicted of a class D or E felony; §§ 70.06(3),(4) which set varying lengths of imprisonment for second offenders, depending on the class of the offense; and § 85.00 which restricts the use of intermittent imprisonment to one convicted of a class D or E felony (or an offense that is not a felony). In short, the permissible extent of state interference in an offender's life varies dramatically depending upon the class of the felony of which he is convicted.

26. *Compare:*

N.Y. PENAL LAW § 120.05 (McKinney 1975) Assault in the second degree.

A person is guilty of assault in the second degree when:

1. With intent to cause serious physical injury to another person, he causes such injury to such person or to a third person . . . .

Assault in the second degree is a class D felony.

with:

§ 125.20 Manslaughter in the first degree.

A person is guilty of Manslaughter in the first degree when:

1. With intent to cause serious physical injury to another person, he causes the death of such person or of a third person . . . .

Manslaughter in the first degree is a class B felony.

27. *Compare:*

N.Y. PENAL LAW § 140.25 (McKinney 1975) Burglary in the second degree.

A person is guilty of burglary in the second degree when he knowingly enters or remains unlawfully in a building with intent to commit a crime therein, and when:

. . . .

2. The building is a dwelling and the entering or remaining occurs at night.

Burglary in the second degree is a class C felony.

with:

§ 140.30 Burglary in the first degree.

A person is guilty of burglary in the first degree when he knowingly enters or

assault,[29] and unlawfully using slugs,[30] to mention but a few.[31] Dif-

remains unlawfully in a dwelling at night with intent to commit a crime therein, and when, in effecting entry or while in the dwelling or in immediate flight therefrom, he or another participant in the crime:

. . . .

2. Causes physical injury to any person who is not a participant in the crime . . . .

Burglary in the first degree in a class B felony.

28. *Compare:*

N.Y. PENAL LAW § 155.24 (McKinney 1975) Petit larceny.

A person is guilty of petit larceny when he steals property.

Petit larceny is a class A misdemeanor.

with:

§ 155.30 Grand larceny in the third degree.

A person is guilty of grand larceny in the third degree when he steals property and when:

1. The value of the property exceeds two hundred fifty dollars . . . .

Grand larceny in the third degree is a class E felony.

and with:

§ 155.35 Grand larceny in the second degree.

A person is guilty of grand larceny in the second degree when he steals property and when the value of the property exceeds one thousand five hundred dollars.

Grand larceny in the second degree is a class D felony. Although on its face this sequence does not appear to implement the principle of aggravated harm, § 155.20 makes it clear that it does:

§ 155.20 Larceny; value of stolen property.

For the purposes of this title, the value of property shall be ascertained as follows:

1. Except as otherwise specified in this section, value means the market value of the property at the time and place of the crime, or if such cannot be satisfactorily ascertained, the cost of replacement of the property within a reasonable time after the crime.

But see text accompanying notes 89-94 *infra.*

29. *Compare:*

N.Y. PENAL LAW § 120.05 (McKinney 1975) Assault in the second degree.

A person is guilty of assault in the second degree when:

. . . .

6. In the course of and in furtherance of the commission or attempted commission of a felony, other than a felony defined in article one hundred thirty, or of immediate flight therefrom, he, or another participant if there be any, causes physical injury to a person other than one of the participants.

Assault in the second degree is a class D felony.

(The New York Court of Appeals appears to have interpreted § 120.05(6) as a strict liability offense. *See* People v. Fonseca, 36 N.Y.2d 133, 365 N.Y.S.2d 818, 325 N.E.2d 143 (1975). Thus, the "unearthly intervention" that Mr. Justice Blackmun thought necessary before one could assault "another of whose existence one is ignorant," may have materialized. United States v. Feola, 95 S. Ct. 1255, 1267 (1975).)

with:

§ 120.10 Assault in the first degree.

A person is guilty of assault in the first degree when:

. . . .

4. In the course of and in furtherance of the commission or attempted commission of a felony or of immediate flight therefrom, he, or another participant if there be any, causes serious physical injury to a person other than one of the participants.

ferential sentencing[32] presumably serves deterrence, rehabilitation or

Assault in the first degree is a class C felony.

and with:

§ 125.25 Murder in the second degree.

A person is guilty of murder in the second degree when:

. . . .

3. Acting either alone or with one or more other persons, he commits or attempts to commit robbery, burglary, kidnapping, arson, rape in the first degree, sodomy in the first degree, sexual abuse in the first degree, escape in the first degree, or escape in the second degree, and, in the course of and in furtherance of such crime or of immediate flight therefrom, he, or another participant, if there be any, causes the death of a person other than one of the participants. . . .

Murder in the second degree is a class A-1 felony.

Note also that the relationship of the felony-assault and murder sections to each underlying felony that could support a charge of felony-assault or murder is another illustration of the principle of aggravated harm. For brief but illuminating discussions of this point, see MACAULAY, A PENAL CODE PREPARED BY THE INDIAN LAW COMMISSIONERS, Note M at 64-65 (1837); MODEL PENAL CODE § 201.2(1)(6), Comment (Tent. Draft No. 9, 1959).

30. *Compare:*

N.Y. PENAL LAW § 170.55 (McKinney 1975) Unlawfully using slugs in the second degree.

A person is guilty of unlawfully using slugs in the second degree when:

. . . .

2. He makes, possesses or disposes of a slug with intent to enable a person to insert or deposit it in a coin machine.

Unlawfully using slugs in the second degree is a class B misdemeanor.

with:

§ 170.60 Unlawfully using slugs in the first degree.

A person is guilty of unlawfully using slugs in the first degree when he makes, possesses or disposes of slugs with intent to enable a person to insert or deposit them in a coin machine, and the value of such slugs exceeds one hundred dollars.

Unlawfully using slugs in the first degree is a class E felony.

But see text accompanying notes 89-94 *infra.*

31. For other examples of the principle of aggravated harm, compare the sections within the following sequences: N.Y. PENAL LAW §§ 145.00 -.10 (McKinney 1975); §§ 145.00(2), -.25; §§ 160.05, -.10(2)(a), -.15(1); §§ 165.40, -.45(1), -.50; §§ 205.55, -.60; §§ 240.05, -.06.

The principle of aggravated harm is most often discussed in the context of attempts. H. L. A. HART, *supra* note 1, at 125-131; G. WILLIAMS, *supra* note 21, at 136-37; Sayre, *Criminal Attempts,* 41 HARV. L. REV. 821, 838-39 (1928); Strahorn, *The Effect of Impossibility on Criminal Attempts,* 78 U. PA. L. REV. 962, 966-69 (1930). If a criminal attempt requires that the last proximate act necessary to effectuate the crime be done, then attempts would be an example of the principle of aggravated harm (assuming that the penalty for the attempt is less than that for the consummated crime, as is generally the case in New York. *See* N.Y. PENAL LAW § 110.05). However, the New York Penal Law may not require the last proximate act for there to be an attempt. *See* N.Y. PENAL LAW § 110.00. *Compare* People v. White, 55 Misc. 2d 298, 285 N.Y.S.2d 633 (Sup. Ct. 1967) *with* People v. White, 32 App. Div. 2d 463, 305 N.Y.S.2d 42 (4th Dep't 1969), *aff'd,* 26 N.Y.2d 915, 310 N.Y.S.2d 101 (1970).

incapacitation, but it is not clear how these goals are enhanced if an of-

32. Although this article will only treat in depth the problems engendered by the principle of aggravated harm, other aspects of the Penal Law are arguably grounded on a retributive basis. For example, N.Y. PENAL LAW § 15.10 (McKinney 1975) makes explicit what appears obvious from a reading of any substantive provision of the Penal Law—that a person becomes criminally liable only upon committing an offense. Yet, of all the theories of punishment, only retribution need be concerned with limiting punishment to an offender for his offense. Rehabilitation and incapacitation need only be concerned with a person's tendencies rather than his acts, while general deterrence need be concerned solely with the effect on the rest of society of punishment of this individual for what he has done, or what the rest of society can be convinced he has done. Armstrong, *The Retributionist Hits Back,* in PHILOSOPHY OF PUNISHMENT 138 (H. B. Acton ed. 1968); Mabbot, *Punishment,* in *id.* at 39; note 59 *infra.* (This criticism of deterrence theory has been rejected by John Rawls on the grounds that it presupposes a highly unlikely ability of a government to perpetrate a continuing fraud on its populace. Rawls, *Two Concepts of Rules,* in *id.* at 105. However, Rawls' point goes only to the wisdom, not the logic, of the matter). This is a good example, once again, of the necessity of distinguishing the justification of the practice of punishment and the justification of individual applications of the practice of punishment. As H. L. A. Hart puts it: "[I]t is perfectly consistent to assert *both* that the General Justifying Aim of the practice of punishment is its beneficial consequences *and* that the pursuit of this General Aim should be qualified or restricted out of deferrence to principles of Distribution which require that punishment should be only of an offender for an offense." H. L. A. HART, *supra* note 1, at 9. Arguably, all that § 15.10 does is to qualify "the pursuit of the General Aim" of the Penal Law; at any rate, only retribution logically demands that a person commit an offense as a prerequisite to punishment.

Another issue that deserves mention is whether punishment, whatever its form, is by definition retributive. Thus, Anthony Quinton has argued that "retributivism, properly understood, is not a moral but a logical doctrine, and . . . does not provide a moral justification of the infliction of punishment but an elucidation of the use of the word." Quinton, *On Punishment,* in PHILOSOPHY OF PUNISHMENT, *supra* at 55. For a complete account of this issue, see Flew, *The Justification of Punishment,* in *id.* at 83 (one of the better known definitional attempts); Baier, *Is Punishment Retributive,* in *id.* at 130. That the New York Penal Law contemplates "punishing" offenders seems clear. Section 1.05(4) states that one of the purposes of the Penal Law is "to differentiate on reasonable grounds between serious and minor offenses, and to *prescribe proportionate penalties therefor*" (emphasis added), and each of § 5.05's three subsections speaks of "punishment for" offenses. *See also* N.Y. PENAL LAW § 10.00(1) (McKinney 1975). Moreover, there seems to be widespread agreement that imprisonment—the most important of the Penal Law's sanctions—for whatever reason is punishment: "The mere deprivation of liberty, however benign the administration of the place of confinement, is undeniably punishment." F. ALLEN, THE BORDERLAND OF CRIMINAL JUSTICE 37 (1964) *quoting* GAROFALO, CRIMINOLOGY 241-42 (1914). *See also* People *ex rel.* Cerzosie v. Warden, 223 N.Y. 307, 119 N.E. 564 (1918); H. PACKER, *supra* note 19, at 33. For a dissent from this equating of punishment and imprisonment, see Griffiths, *The Limits of Criminal Law Scholarship,* 79 YALE L.J. 1388, 1408-10 (1970). The point is, of course, that if imprisonment is punishment, and punishment is retributive, then once again a significant portion of the Penal Law is retributively based.

Whatever the ebb and flow of philosophical debate, I think it clear that to the average man on the street the criminal law imposes punishment. As Prof. Weinreb says:

> [P]unishment [does not] seem to be a necessary concomitant of the criminal law. . . . Just the same, it is very natural to think of punishment as 'part of' the criminal law, and most of us would regard punishment as part of the paradigm of criminal law; it would be curious if someone gave as an example of criminal law a rule *not* involving punishment for infractions.

L. WEINREB, CRIMINAL LAW 529 (1975).

One final aspect of the Penal Law that may be retributively based deserves mention,

fender's sentence[33] varies dramatically according to circumstances that appear to be beyond his control or knowledge.[34]

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and that is the set of ideas contained in what H. L. A. Hart calls the "principle of responsibility." H. L. A. HART, *supra* note 1, at 177. The principle of responsibility refers to the mental state required of a person before criminal liability can result. Thus, it includes not only the intent to commit the proscribed act that is normally associated with mens rea (N.Y. PENAL LAW §§ 15.05, -.10, -.15), but also such diverse areas as the effect of mistake upon liability (N.Y. PENAL LAW § 15.20), infancy and insanity (N.Y. PENAL LAW §§ 30.00-.05), justification and defense of self and property (N.Y. PENAL LAW §§ 35.00-.30), and duress (N.Y. PENAL LAW § 40.00). (The diversity is more apparent than real, of course, as all of these concepts are conditions excusing liability). As Hart points out, it is easy to justify the place the principle of responsibility has in the criminal law "[so] long as punishment is viewed as a return of pain and suffering for moral evil done, justified by the intrinsic fitness of sentence to crime, or so long as a denunciatory theory is accepted, in which the ultimate justification of punishment is held to be its function as an expression of the community's moral indignation . . . ." H. L. A. HART, *supra* note 1, at 176. The U.S. Court of Appeals for the D.C. Circuit expressed Hart's point in its defense of the insanity plea: "Our collective conscience does not allow punishment where it cannot impose blame." Durham v. United States, 214 F.2d 862, 876 (D.C. Cir. 1954). Imposing blame, of course, is only necessary in a retributive system. As Lady Barbara Wootton has pointed out, a system based upon rehabilitation and incapacitation does not need the principle of responsibility because such a system would not impose blame. *See* B. WOOTTON, CRIME AND THE CRIMINAL LAW 52-57 (1963); Furthermore, to the extent that the existence of excusing conditions may encourage a person to commit a criminal act by increasing his perceived chance of avoiding liability, deterrence suffers. Although recognizing the problems excusing conditions pose for deterrence, Michael and Wechsler nonetheless construct an elegant deterrent justification of excuses and conclude that excuses "will not seriously weaken the deterrent effect of the law...." Michael & Wechsler, *A Rationale of the Law of Homicide: I,* 37 COLUM. L. REV. 701, 752 (1937). Whether or not one should conclude that the principle of responsibility is retributively based is disputable. Prof. Hart does not reach this conclusion: "There are values quite distinct from those of retributive punishment which the system of responsibility does maintain, and which remain of great importance even if our aims in punishing are the forward-looking aims of social protection." H.L.A. HART, *supra* note 1, at 180-81. For a thorough discussion of Hart's view, see Wasserstrom, *H.L.A. Hart and the Doctrines of Mens Rea and Criminal Responsibility,* 35 U. CHI. L. REV. 92 (1967).

33. The problem is not endemic to New York. Quite a number of states have ostensibly rejected retribution as a justification for punishment, yet still employ the principle of aggravated harm—as does the Model Penal Code (notwithstanding the fact that the Chief Reporter, Herbert Wechsler, recognized the problem the principle poses. Wechsler, *The Challenge of a Model Penal Code,* 65 HARV. L. REV. 1097, 1106-07 (1952)). For a representative sample of these states and statutes, see Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law,* 122 U. PA. L. REV. 1497, 1498-1503 (1974).

34. Dealing with sequences of criminal prohibitions that are essentially identical, differing only in their respective harm requirements, isolates the issue of the significance that is accorded the occurrence of harm. If the relevant statutes were not substantially identical, then the problem of ascertaining the impact of the occurrence of differing harms would be exacerbated, as other factors would have to be considered. *See* note 31 *supra.* This would involve, for example, making judgments as to the relative seriousness of different crimes. As Prof. Armstrong has pointed out, "it may be very difficult to decide which of two crimes is the more serious and thus deserving of severer punishment. . . ." Armstrong, *supra* note 32, at 157. *See also* H.L.A. HART, *supra* note 1, at 161-63. For an interesting study that suggests that neither prescribed nor imposed penalties accurately reflect popular mores, and that there is disagreement as to appropriate penalties among various groups of the population, thus adding yet another wrinkle

The purpose of this article is to examine the principle of aggravated harm to determine if it is consistent with the legitimized[35] justifications of punishment.[36] This analysis is called for because, public

to the problem of inter-crime comparisons, see Rose & Prell, *Does the Punishment Fit the Crime?*, 61 AM. J. SOC. 247 (1955-56).

On the other hand, inter-crime comparisons may yield interesting results. *Compare, e.g.*, N.Y. PENAL LAW § 120.20 (McKinney 1975) "Reckless endangerment in the second degree: A person is guilty of reckless endangerment in the second degree when he recklessly engages in conduct which creates a substantial risk of serious physical injury to another person" (a class A misdemeanor) *with* N.Y. PENAL LAW § 120.10(4), "Assault in the first degree: A person is guilty of assault in the first degree when: . . . In the course of or in furtherance of the commission or attempted commission of a felony or of immediate flight therefrom, he . . . causes serious physical injury to a person other than one of the participants" (a class C felony). It seems to me that the sanction authorized by § 120.10(4) could scarcely serve any function but retribution, given the penalty for the underlying crime or attempt, whereas the sanction authorized by § 120.20 arguably is consistent with § 1.05(5). Moreover, for a crime for which the sanction can serve the legitimized goals of punishment scarcely at all, but in which harm is done, the penalty is high, as compared to a crime for which the sanction may serve the goals but no harm is done.

35. As suggested in the text, I will discuss the implications of the differential punishment that may be imposed rather than is imposed, *i.e.*, what the legislature, rather than the sentencing judge, has done. The reason for this is two-fold. First, my concern is the justification of punishment, which is primarily a legislative, rather than a judicial, function. *Cf.* Gore v. United States, 357 U.S. 386 (1958); People v. Oliver, 1 N.Y.2d 152, 134 N.E.2d 197, 151 N.Y.S.2d 367 (1956); M. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 105-18 (1972). *But see* Furman v. Georgia, 408 U.S. 238 (1972). *Compare* 408 U.S. at 342-46 (Marshall, J., concurring) *with* 408 U.S. at 431 (Powell, J., dissenting). Second, even if there were good data on what judges in New York do, which there is not, I am confident that it would simply demonstrate the lack of consistency among sentencing judges that is prevalent throughout the United States. For a study of sentence disparity among federal judges in New York, see Seymour, *1972 Sentencing Study for the Southern District of New York*, 45 N.Y.S.B.J. 163 (1973). Much like the two judges of old England, one of whom sentenced a chicken thief to a few month's imprisonment while the other sentenced the thief's co-felon to be transported, J. ROMILLY, OBSERVATIONS ON THE CRIMINAL LAW OF ENGLAND 18-19 (1810), reprinted in part in J. MICHAEL & H. WECHSLER, CRIMINAL LAW AND ITS ADMINISTRATION 252-55 (1940), judges today seem generally unable to agree on how to exercise their sentencing discretion. The result is wide disparity in sentencing. *See* THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 14-28 (1967); SENTENCING INSTITUTE FOR THE FIRST AND SECOND UNITED STATES JUDICIAL CIRCUITS, JUSTICE IN SENTENCING: PAPERS AND PROCEEDINGS (1974); *Appellate Review of Sentences, A Symposium at the Judicial Conference of the United States Court of Appeals for the Second Circuit*, 32 F.R.D. 249 (1962); Note, *Appellate Review of Primary Sentencing Decisions: A Connecticut Case Study*, 69 YALE L.J. 1453 (1960). A more recent, and even more shocking, example of sentence disparity than the chicken thievery case was given by James V. Bennett. According to Mr. Bennett, two embezzlers were convicted in adjoining courtrooms during the same week and the two cases differed in no significant respect except for the sentences imposed; one man received 30 days, the other 15 years. Bennett, *Count Down for Judicial Sentencing*, 28 J.B. ASS'N D.C. 420, 424 (1961).

36. Another area that will not be discussed is what is done to, or with, offenders while incarcerated. For example, N.Y. CORREC. LAW § 136 (McKinney 1968) mandates that "each inmate shall be given a program of education which, on the basis of available data, seems most likely to further the process of socialization and rehabilitation."

statements to the contrary notwithstanding,[37] the principle of aggravated harm can be justified in at least two ways which have marked retributive overtones—by a theory of retaliation, and by the notion that punishment is necessary for "sharpening . . . the community's sense of right and wrong."[38]

The principle of aggravated harm may simply be "a crude retaliation theory, where the degree of punishment is linked rather to the amount of damage done than to the intention of the actor"[39]—a direct descendant of the notion of "an eye for an eye."[40] Whereas *lex talionis* matches the harm done to the offender with the harm done by him, the principle of aggravated harm admits the difficulty of this[41] and employs instead a somewhat arbitrary punishment for the crime involving the least harm[42] and increases the punishment as the harm done by the offender increases. Thus, the principle of aggravated harm may be no more than a variant of a theory of retaliation that developed in response to the difficulties inherent in a pure retaliation theory.

Furthermore, the justification of the principle of aggravated harm may be a derivative of the justification of the pure retaliation theory. If in fact the "criminal law was . . . in origin an instrument of vengeance by which the state satisfied . . . the vindictive reactions of its citizens,"[43]

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37. *See* notes 11-19 *supra* & accompanying text.

38. H.M. HART, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401 (1958). For this discussion I will assume that the severity of harm caused by an offender is fortuitous. For example, I will assume that when a person recklessly creates a grave risk of death under circumstances evincing a depraved indifference to human life, whether he injures no one, injures someone seriously, or kills someone, is a matter of chance and does not reflect on the actor. This assumption, of course, must be examined in turn. *See* note 48 *infra*.

39. G. WILLIAMS, *supra* note 21, at 136.

40. *See* I. KANT, *supra* note 19; H. PACKER, *supra* note 19, at 37.

41. The inability to match punishments to offenses with precision has long been recognized. As Blackstone pointed out:

> [T]here are very many crimes, that will in no shape admit of these penalties, without manifest absurdity and wickedness. Theft cannot be punished by theft, defamation by defamation, forgery by forgery, adultery by adultery . . . .

4 W. BLACKSTONE, COMMENTARIES *13. An even better example is the difficulty of applying the theory of "an eye for an eye" as an exact measure of punishment in the case of a two-eyed sighted man who destroys the sight in the only good eye of another. *Id.* Occasionally a fairly close equivalence between harm and the punishment was achieved. For example, the punishment for mayhem was "the loss of the same member as suffered by the victim." R. PERKINS, CRIMINAL LAW 188 (2d ed. 1969). *See also* 1 H. HAWKINS, PLEAS OF THE CROWN ch. 44, § 3, at 175-76 (6th ed. 1788).

42. H. L. A. HART, *supra* note 1, at 162:

> [E]ven if it were possible to arrange all crimes on a scale of relative seriousness, our starting point or base of comparison must be a crime for which a penalty is fixed otherwise than by comparison with others. We must start somewhere, and in practice the starting point is apt to be just the traditional or usual penalty for a given offense.

43. J. MICHAEL & M. ADLER, CRIME, LAW AND SOCIAL SCIENCE 340 n.7 (1933). It

then the most logical response to a wrongful act is "the measure of vengeance likely to be exacted by an aggrieved person under the circumstances of the case."[44] If an exact measure of vengeance is not possible, the next best method of satisfying vengeful desires is a scheme that correspondingly increases punishment as the harm done by the offender increases, in an attempt to accommodate intensified vengeful desires—which is precisely the effect of the principle of aggravated harm.[45]

The second retributive justification of the principle of aggravated harm is the idea that retribution in punishment is necessary to maintain the community's revulsion to crime—"the community's sense of right and wrong."[46] A. Goodhart feels that "without a sense of retribution we may lose our sense of wrong. Retribution in punishment is an expression of the community's disapproval of crime, and if this retribution is not given recognition then the disapproval may also disappear. A community which is too ready to forgive the wrongdoer may end by condoning the crime."[47] However, the "sense of wrong" that retributive punishment may help maintain is not necessarily a single-valued entity. Indeed, just as the desire for vengeance may be related to the harm done, so too may the community's perception of wrong be related to the seriousness of the consequences. Thus, while the principle of aggravated harm may facilitate satisfaction of vengeful feelings by relating harm and punishment, it may concomitantly "sharpen" the public's "sense" of wrong.[48] To the extent that it does or is designed

is occasionally suggested that the theory of retaliation is based solely on the notion that it is right to do harm to one who does harm. *Cf.* F. ZIMRING & G. HAWKINS, DETERRENCE 166 (1973). So far as I know, no one has ever taken the position that punishment is justified for no other reason than that harm was done. Even the early law of England that seemed to ground the criminal law on a strict liability basis did not punish solely because harm was done. 2 F. POLLOCK & F. MAITLAND, HISTORY OF ENGLISH LAW 448-62, 470 (1968).

44. H. MAINE, ANCIENT LAW 365 (1861).

45. Whether the public in fact desires that vengeance be exacted on criminals is disputed by some. Weihofen, *Retribution is Obsolete,* in RESPONSIBILITY 116, 120 (Nomos, No. 3, 1960). *But see* note 126 *infra.*

46. H. M. Hart, *supra* note 38.

47. A. GOODHART, ENGLISH LAW AND THE MORAL LAW 92-93 (1953). *See also* F. ALEXANDER & H. STAUB, THE CRIMINAL, THE JUDGE, AND THE PUBLIC 5-9, 213-15 (1931). This belief that punishment is necessary to maintain the community's sense of wrongdoing is what underlies James Fitzjames Stephen's famous comment that "the sentence of the law is to the moral sentiment of the public in relation to any offense what a seal is to hot wax." 2 J. STEPHEN, HISTORY OF THE CRIMINAL LAW IN ENGLAND 81 (1883); *see* H. PACKER, *supra* note 19, at 37. The extent to which the "sentence of the law" ought to be "to the moral sentiment of the public" as a "seal is to hot wax," has been the source of much debate. *Compare* J. MILL, ON LIBERTY (1859) *with* J. STEPHEN, LIBERTY, EQUALITY, FRATERNITY (1873); and P. DEVLIN, THE ENFORCEMENT OF MORALS (1965) *with* H.L.A. HART, LAW, LIBERTY AND MORALITY (1963).

48. This discussion of retribution and the principle of aggravated harm was predicated upon the assumption that the occurrence of any particular severity of harm is

to do either, a justification with strong retributive attributes may be constructed.[49]

II

Simply demonstrating that the principle of aggravated harm may be retributively justified does not complete the inquiry—analysis must proceed further. Since our concern is whether the Penal Law subscribes to its own mandate, deterrence, incapacitation and rehabilitation must be examined as possible justifications.[50] This examination will be facilitated by breaking the discussion down into two parts, each operating on one of the two assumptions that the principle itself must operate on: (a) the severity of resultant harm of any particular prohibited act is fortuitous and does not reflect on the actor; or (b) the severity of harm is not fortuitous and does reflect on the actor.[51] A reading of any sequence of sections which employs the principle of aggravated harm suggests that the first of these two assumptions is operant,[52] for there are absolutely no differences in the elements of each particular crime of a series other than the requisite harm. Nonetheless, the significance of the occurrence of harm must itself be examined in order to ascertain if harm is simply the unfortunate result of other

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fortuitous. *See* note 38 *supra*. That assumption may be contrary to fact, however, as I will later discuss. *See* § II B *infra*. For present purposes it is sufficient to note that if the occurrence of more severe harm does indicate a greater moral culpability on the part of the offender, then once again the principle of aggravated harm can be retributively justified. In fact, if harm does indicate culpability, then to the extent that retribution entails relating punishment to the moral culpability of the offender, which is the position of most retributionists, the principle of aggravated harm becomes a necessary component of punishment. Bradley, *The Vulgar Notion of Responsibility in Connexion with the Theories of Free-Will and Necessity*, in ETHICAL STUDIES 1 (1870). Kant carried the concept of retributive punishment one step further; not only did moral culpability justify punishment, punishment was a categorical imperative in such cases, which makes punishment "obligatory, even on the eve of a dissolution of a society against whose laws the person to be punished has offended." H.L.A. HART, *supra* note 1, at 232. *See also* I. KANT, PHILOSOPHY OF LAW 198 (Hastie transl. 1887).

49. This discussion of "sharpening the community's sense of right and wrong" is similar to but different from the discussion of the moralizing or educative function of the criminal law that is to follow. *See* notes 74-80 & 94-95 *infra* & accompanying text. The difference lies in the importance of punishment as an expression of vindictive feelings. Furthermore, it is not necessary that the principle of aggravated harm help to maintain a community's "sense of right and wrong" for there to be a retributive justification. It suffices if the principle facilitates expressing the community's condemnation, regardless what the secondary consequences may be.

50. Other explanations of the Penal Law's reliance on harm are noted in § III *infra*.

51. This is, of course, the logical structure employed in the discussion of the retributive justification of the principle. *See* notes 38 & 48 *supra*. The discussion of (b) will amount, in essence, to a consideration of the validity of (a).

52. *See* notes 22-24, 26-31 *supra*.

factors, or whether the occurrence of harm yields insights into those other factors which suggest that the severity of harm is a relevant criterion in determining the appropriate sanction by a penal system that has purportedly abandoned retributive notions of punishment.[53]

A

If we assume that the severity of the resultant harm of a proscribed act is fortuitous, relating the term of imprisonment to the severity of the resultant harm clearly cannot be justified on the basis of rehabilitation or incapacitation.

Rehabilitation and incapacitation are concerned primarily with the offender's personal characteristics. "Rehabilitation" involves isolating a person who is not able to function appropriately in society, diagnosing the cause of the inability to function, and eliminating it, so that the offender may be returned to society.[54] "Incapacitation" entails the restraint of a person who has sufficiently strong anti-social tendencies that there is a high risk that if he is released he will commit further criminal acts.[55] In both, the concern is the offender rather than his acts[56]—the goal of rehabilitation being to "cure the disease,"[57] while that of incapacitation being to quarantine it.

If the concern is the characteristics of the offender, as it is with rehabilitation and incapacitation, and if the severity of the resultant harm is fortuitous, as we have assumed, then it is obvious that the severity of harm is not relevant to the determination of a sanction that is to serve either function. If the resultant harm is entirely fortuitous, then the severity of harm will not reflect the personal characteristics of the offender. Consequently, the principle of aggravated harm cannot be justified on the basis of rehabilitation or incapacitation, given our present assumption.[58]

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53. *See* N.Y. PENAL LAW § 1.05(5) (McKinney 1967). The examination will be one of marginal gain—whether the increased penalty when harm occurs yields increased deterrence, enhances rehabilitation or better protects society.

54. N. MORRIS, THE FUTURE OF IMPRISONMENT 12-20 (1974); PACKER, *supra* note 19, at 53-58.

55. *Cf.* H. PACKER, *supra* note 19, at 48-53.

56. In fact, neither rehabilitation nor incapacitation demands a prior criminal act, as they are concerned with propensity. *See* H. PACKER, *supra* note 19, at 48-58 & note 32 *supra.*

57. The metaphor of disease has recently come under attack. N. MORRIS, *supra* note 54, at 16-20; K. Boyle, *The Disease Concept of Crime,* 21 No. IRE. L.Q. 274 (1970).

58. Glanville Williams reaches a similar conclusion in his discussion of the relevance of harm in the context of attempts:

> In a moral view, it may be thought that a person who attempts a crime is as bad

To complete this analysis, deterrence[59] must be examined. Before proceeding, however, a caveat is in order. Notwithstanding the ancient lineage of deterrence theory,[60] there is scant empirical validation of its tenets.[61] Indeed, one commentator has concluded that empirical validation of deterrence theory is so slight that, "[a]nalysis . . . must . . . proceed on a level . . . akin to minor tinkering with third-rate equipment."[62] Nonetheless, there is a general consensus that penal laws do have a deterring effect on criminality,[63] as exemplified in the New York Penal Law.[64] This alone justifies rigorous analysis, but we must proceed more on a logical than empirical plane, even though the deterrent efficacy of any particular scheme is an empirical, not a logical, matter. That we cannot definitively resolve complex empirical questions should not be all that troublesome, however. We can still examine what limited evidence there is to support a deterrence justification of

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as he who by better fortune manages to consummate it. Punishment as moral expiation (if that theory is maintained) should therefore fall on both with the same severity. Again, the objects of incapacitation and reform would permit of no distinction being made, for the danger is the same where the criminal's failure to complete is due only to chance.

G. WILLIAMS, *supra* note 21, at 136.

59. My concern here is general, rather than specific, deterrence. Specific deterrence, with its concern for the inhibiting effect of punishment on the offender, is subsumed under the issue of the chance of a particular offender recidivating. *See* notes 97-98 *infra* & accompanying text.

60. A lineage that extends at least as far back as Plato:

No one punishes the evil-doer under the notion, or for the reason, that he has done wrong—only the unreasonable fury of a beast acts in that manner. But he who desires to inflict rational punishment does not retaliate for a past wrong which cannot be undone; he has regard for the future and is desirous that the man who is punished, and he who sees him punished, may be deterred from doing wrong again. He punishes for the sake of prevention.

PLATO, PROTAGORAS 324 (B. Jowett tranls. 1956). *See also* PLATO, THE REPUBLIC 380, 615 (Bloom tranls. 1968). Aristotle, Cicero and St. Thomas Aquinas apparently concurred with Plato. *See* MICHAEL & ADLER, *supra* note 43, at 342-52.

61. *See* J. ANDENAES, PUNISHMENT AND DETERRENCE 3-33 (1974). This is not to say, of course, that empirical evidence of any proposition of deterrence theory is entirely lacking. *See, e.g., id.* at ch. III; Cramton, *Driver Behavior and Legal Sanctions: A Study of Deterrence,* 67 MICH. L. REV. 421 (1969); Schwartz & Orleans, *On Legal Sanctions,* 34 U. CHI. L. REV. 274 (1967). For a collection of studies suggesting that punishment does deter crime, see Tullock, *Does Punishment Deter Crime,* 36 THE PUB. INTEREST 103 (1974).

62. Schulhofer, *supra* note 33, at 1518. *See also* ANDENAES, *supra* note 61, at 9-10: "[I]t can hardly be denied that any conclusions as to the real nature of general prevention [deterrence] involves a great deal of guesswork."

63. *See* notes 60-61 *supra;* N. MORRIS, *supra* note 54, at 58; H. PACKER, *supra* note 19, at 39-45; F. ZIMRING, PERSPECTIVES ON DETERRENCE (1971); MICHAEL & WECHSLER, *supra* note 19, at 1264-68; Morris & Zimring, *Deterrence and Corrections,* 381 ANNALS 137 (1964). The consensus is by no means unanimous, however. *See* H. BARNES & N. TEETERS, NEW HORIZONS IN CRIMINOLOGY 338 (2d ed. 1951) ("the claim for deterrence is belied by both history and logic"); ELLINGTON, PROTECTING OUR CHILDREN FROM CRIMINAL CAREERS 43 (1948).

64. N.Y. PENAL LAW § 1.05(5) (McKinney 1967).

the principle of aggravated harm. If we find that, given present knowledge, deterrence theory cannot sustain the principle, this alone will not unequivocally settle the issue, for knowledge may advance. But it may settle whether the New York Legislature could reasonably have concluded that the principle of aggravated harm serves deterrence. Bearing in mind, then, the limited nature of the inquiry,[65] we may examine the relationship between deterrence and the principle of aggravated harm, still proceeding on the assumption that the severity of the resultant harm is fortuitous.

The examination begins with what is often called the classical theory of deterrence,[66] a theory that conceives of man as "a 'lightning calculator of pleasures and pains,' . . . directly responsive to systemic intimidation by threat of punishment designed to outweigh any pleasure to be derived from crime."[67] If men are calculating animals that weigh the costs and benefits of their actions, as the classical theory postulates, then the "simplest way to make people more law abiding . . . is to increase punishment."[68] By increasing the punishment, the perceived disutility[69] of pursuing a particular course of conduct is increased, thus necessitating a greater perceived expected return before prudence dictates that the conduct be pursued. If perceptions of the expected return of any course of conduct vary in the populace, then as the punishment for engaging in that conduct is increased, fewer people will think the risk worth taking.[70] According to the classical

65. One of the best examples of the occasional disparity between theory and practice is the oft discussed but apparently apocryphal study that concluded that the bumblebee could not fly. For a gap just as large as that between the bees and the mathematicians, see the discussion of d'Alembert's Paradox in T. VON KARMAN, AERODYNAMICS 25-27 (1954).

66. P. TAPPAN, CRIME, JUSTICE AND CORRECTION 247 (1960). The classical theory's best known proponent is probably Bentham. *See* J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1876). *See also* C. BECCARIA, ON CRIMES AND PUNISHMENT (1770).

67. Hawkins, *Punishment and Deterrence: The Educative, Moralizing and Habituative Effects,* 1969 WIS. L. REV. 550.

68. J. ANDENAES, *supra* note 61, at 22. The enactment of the drug law, N.Y. PENAL LAW §§ 220.00-.45 (McKinney 1967), seems to be an example of the Legislature trying to implement this theory. *See* Note, *Drug Abuse, Law Abuse and the Eighth Amendment: New York's 1973 Drug Legislation and the Prohibition Against Cruel and Unusual Punishment,* 60 CORNELL L. REV. 638, 658-69 (1975).

69. Perceived disutility is the individual's perception of the risk he is taking, multiplied by the disutility of the consequences if he is caught. Kaplan, *Decision Theory and the Factfinding Process,* 20 STAN. L. REV. 1065, 1068-69 (1968).

70. The problem is complicated by the fact that the perceived disutility is a function of both the severity of punishment and the certainty of its imposition. Antunes & Hunt, *The Impact of Certainty and Severity of Punishment on Levels of Crime in American States: An Extended Analysis,* 64 J. CRIM. L.C. & P.S. 486 (1973); Ehrlich, *Participation in Illegitimate Activities: A Theoretical and Empirical Investigation,* 81 J. POL. ECON. 521 (1973); Kaplan, *supra* note 69. For purposes of this article, I am

theory, those people who chose not to offend will have been deterred from criminality.

Superficially, the principle of aggravated harm appears to implement the classical theory of deterrence. As harm increases so does the severity of punishment, which makes the conduct less attractive. If, however, the severity of resultant harm is a matter of chance, this relationship between the principle and the classical theory cannot be maintained. What is to be deterred is the conduct that causes the harm, rather than the harm itself. Thus, the penalities should be imposed by reference to the act rather than the act's fortuitous results.

For example, consider once again the situation where a person recklessly creates a grave risk of death under circumstances evincing a depraved indifference to human life.[71] If it is a simple matter of chance whether in these circumstances no harm or death to another results, the penal sanction should increase the costs of recklessly creating a grave risk of death, rather than the costs related to a fortuitous event.[72] By directing attention to the harm rather than to the underlying con-

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assuming that the perceived certainty of imposition does not vary with changes in severity. This assumption is most likely contrary to fact in many cases (such as when a hue and cry is raised over a particular form of criminality resulting in increased penalties and prosecution). If this assumption is not contrary to fact yet another problem is posed for a deterrence justification of the principle of aggravated harm. The Antunes' study found no evidence to suggest that an increase in severity of punishment without an increase in certainty of imposition affects crime rates. Antunes, *supra* at 492-93.

Another complicating factor is that apparently people differ in their synthesis of the two factors that form expected disutility. Becker, *Crime and Punishment, An Economic Approach,* 76 J. POL. ECON. 169 (1968). For a discussion of these problems, see Schulhofer, *supra* note 33, at 1544-54; F. ZIMRING & G. HAWKINS, *supra* note 43, at 162-72, 195-202.

71. *See* notes 22-25 *supra.*

72. A point apparently overlooked by commentators is that in one limited way the principle of aggravated harm is consistent with classical deterrence theory even if the occurrence of harm is fortuitous. Consider, for example, Prof. Schulhofer's analysis of the Harm Hater's hypothesis that presumes "that the amount of deterrence achieved is solely a function of the penalty applicable to the underlying conduct in the absence of harm." Schulhofer, *supra* note 33, at 1534. His argument is that under the Harm Hater's hypothesis a scheme that imposed a sentence of one year imprisonment regardless of whether harm occurred and a scheme that imposed one year if no harm occurred and two years if it did would have the same deterrent efficacy, presumably because the operant threat is the one directed to the conduct—which is one year in all cases. But, if anyone receives the higher penalty, even though due to the fortuitous occurrence of harm, then the expected disutility of the conduct is not a function of the risk of one year in prison; rather, it is a function of a higher penalty than that. Just how high, of course, depends on how often the fortuitous event occurs. In other words, by imposing an increased penalty, even on an arbitrary basis, the perceived disutility of engaging in the underlying conduct is increased since the chance of more than one year in prison must be accounted for. According to classical deterrence theory this should increase the deterrent efficacy of the penal law, although it does so on the basis of inequality of treatment. *See* note 133 *infra.*

duct that is to be deterred, the principle of aggravated harm acts in opposition to classical deterrence theory.[73]

Deterrence theory, though, has evolved from the days of Beccaria and Bentham. The theory of man as "a lightning calculator of pains and pleasures" who can be directly influenced by the threat of unpleasant consequences has been supplemented by speculation as to the moral or socio-pedagogical influence of punishment.[74] This speculation[75] concerns the extent to which the penal law, through its moral influence,[76] inhibits criminality through the inculcation of either norms or the habit of law abiding. If the criminal law does exert influences of this sort on the populace, thereby inhibiting criminality, deterrence will have been served, albeit in a different way than the

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73. The statutory scheme we are discussing may serve the function, in a limited number of cases, of encouraging the perpetrator of the criminal act to go to the aid of another. Thus, for example, distinguishing between felony assault and felony murder may facilitate aid being brought to the injured party. *See* note 29 *supra*. This argument is analogous to the argument that a lower penalty for attempts, as compared to the consummated crime, serves as an incentive to abandon the scheme. MICHAEL & WECHSLER, *supra* note 19, at 1295 n.81. Even if this argument has validity, I would think the same result could be accomplished in a more direct manner.

74. ANDENAES, *supra* note 61, at 35. *See also* Morris, *Impediments to Penal Reform*, 33 U. CHI. L. REV. 627, 631 (1966). Just as it is debated whether the public demands retribution from offenders, so too is it debated whether the criminal law has a moralizing or educative effect. *Compare* J. ANDENAES, *supra* note 61, at ch. IV (The Moral or Educative Influence of the Criminal Law) *with* Walker & Argyle, *Does the Law Affect Moral Judgments*, 4 BRIT. J. CRIM. 570 (1969). For an excellent discussion of the issue, see Hawkins, *supra* note 67.

It is not quite fair to suggest that the early formulators of deterrence theory did not appreciate the moralizing possibilities of criminal sanctions. As Andenaes points out, Beccaria "expresses a strong belief in the potentialities of criminal law to influence moral attitudes in society." J. ANDENAES, *supra* note 61, at 113.

> If the same punishment be decreed for killing a pheasant as for killing a man, or for forgery, all difference between these crimes will shortly vanish. It is thus that moral sentiments are destroyed in the heart of man.

BECCARIA, *supra* note 66, at 139. *See also* J. BENTHAM, *supra* note 66, at 61.

75. I do not mean to denigrate this position, and my description of it as speculative is meant only to convey that the extent to which these effects occur is an empirical question for which there is, as of yet, no solid answer. *See* R.S. PETERS, ETHICS AND EDUCATION 274 (1966).

76. The best statement of this position is J. ANDENAES, *supra* note 61, at ch. IV. (The Moral or Educative Influence of Criminal Law). Prof. Andenaes' cautious presentation considers various ways, grouped into the categories of direct and indirect influences, by which the content of the criminal law may exert a moralizing or pedagogical influence. The direct influences, which he feels are of lesser importance than the indirect, are: (1) respect for formal law; (2) the criminal law as a moral eye-opener; and (3) punishment as authoritative statements about wrongdoing. The indirect influences include: (1) punishment as eliminating bad examples; and (2) the criminal law as a formulator of the framework for moral education. For a critical review of much of this, see Hawkins, *supra* note 67.

simple reliance on the threat of painful consequences[77] that is the crucial proposition of classical deterrence theory.[78]

Regardless of the validity of this more sophisticated form of deterrence theory, it suffers from the same flaw of misdirection as does classical deterrence theory, if utilized to justify the principle of aggravated harm. If the harm resulting from a proscribed act is fortuitous, then whatever pedagogical or moralizing influence the criminal law has should be directed toward the conduct, not the result. This is not to say that the principle of aggravated harm does not serve the moralizing function at least indirectly, because it may. Occasionally inflicting a more severe penalty, even though based upon chance occurrences, does increase the expected disutility of the conduct and, consequently, may affect society's view of the act.[79] Nor is it to say that the distribution of the resultant harm is irrelevant in determining the gravity of the crime and the need for deterrence. Surely it is not.[80] But, this is to say that the limited extent to which the moralizing function is served by the principle of aggravated harm is a mere happenstance rather than the necessary outcome of a system rationally constructed to achieve that end.

In short, if the severity of resultant harm is fortuitous, pursuit of the affirmative goals of rehabilitation, incapacitation and deterrence is little enhanced by the principle of aggravated harm. At best, the contribution of the principle is a speculative by-product of a misdirected effort. The most persuasive justification of the principle remains that it implements a retributive notion of punishment; any rehabilitative, incapacitative, or deterrent gains are simply welcome side-effects. Before we can conclude, however, that there is no substantial justification of the principle of aggravated harm other than retribution in one form or another, we must examine the assumption upon which this

77. Deterrence theory has evolved in another way. It is becoming increasingly clear that the classical model needs supplementation not only with respect to the secondary effects of threats, but also with respect to the mechanics of threats. *See* F. ZIMRING & G. HAWKINS, *supra* note 43, at ch. IV (The Deterrent Effect), 298 n.67. *See also* note 70 *supra*.

78. For a criticism of including the inhibiting effect on criminality that a penal law may effect by way of its educative or moralizing tendencies within the definition of deterrence, see Hawkins, *supra* note 67, at 551-52. This appears to me to be a rather uneventful semantic quibble, although Prof. Hawkins apparently feels otherwise. *Id.* at 552.

79. *See* note 72 *supra*.

80. For example, if conduct X results 70% of the time in no harm, 20% in physical harm to another and 10% in death, then it is obviously less serious conduct than Y if Y results in physical harm 40% of the time and death 60% (assuming the incidence of X and Y to be equal).

discussion has been based. We proceed, then, to an examination of the significance of the harm resulting from a proscribed act.

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Briefly, the issue is whether the severity of resultant harm differentiates among similar acts[81] in such a way as to make it a relevant criterion in the imposition of a sanction for deterrent, rehabilitative, or incapacitative purposes.

Ways in which harm could act as a rational discriminator come easily to mind. For instance, a more severe harm may indicate that the actor is a more dangerous individual, likely to engage in further criminality, or that he is "sicker" and more in need of rehabilitation than one who commits ostensibly the same act but with more felicitous results. Either could be true if the severity of harm is an indication of the strength of anti-social propensities or characteristics. Whether the severity of harm yields insights into the desires and motivation of the actor, insights that are relevant in determining the appropriate sanction, is another issue that must be considered.

Regardless of the validity of any of the suggestions above, none of them demonstrate that the severity of harm is more than tangentially relevant to the determination of a sanction designed to serve deterrence. Even if the occurrence of a serious harm is positively correlated with highly dangerous actors whom we wish to deter more than others,[82] deterrence of this group is not likely to be enhanced by punishing its members more severely than others.[83] For a threat to deter a particular group, the threat must be communicated to its members,[84] and they must perceive the threat as applicable to them. As Zimring and Hawkins have said: "Members of an audience will not fear the imposition of threatened consequences unless they are persuaded that the threat is meant to apply to them."[85] In other words, even if harm does distinguish the less from the more dangerous, punishing the latter more harshly than the former will have the intended deterrent effect only so far as there are those who consider it likely that if they engage in the

81. *See* text of statute accompanying notes 22-31 *supra.*

82. This assumption is likely contray to fact. *See* notes 99-111 *infra* & accompanying text.

83. It may, of course, have some specific deterrence effect, but our concern is general deterrence. *See* note 59 *supra.*

84. J. ANDENAES, *supra* note 61, at 137. *See also* F. ZIMRING & G. HAWKINS, *supra* note 43, at 142-49.

85. F. ZIMRING & G. HAWKINS, *supra* note 43, at 158.

prohibited conduct the necessary harm is likely to occur—a small group, no doubt.[86]

Nor does any relationship between severity of harm and the actor's desires[87] support a deterrence justification of the principle of aggravated harm. Here there are two possible cases: either the severity of harm indicates the extent to which the actor desired to commit the proscribed act, or it indicates that the actor desired to effect the consequences that in fact occurred. For purposes of deterrence, the first of these—the strength of the actor's desires to commit the proscribed act—is immaterial. What is to be deterred is not the vehement unlawful use of slugs, for example,[88] but any unlawful use of slugs, even if half-hearted. Vagaries of desire are clearly of no interest to deterrence theory, for it is the simple doing of the act that is of importance. The offender and his offense are being used as examples for the edification of others.

On the other hand, the second possibility—that the occurrence of a certain severity of harm indicates that the actor intended to effect that harm—may lend some limited support to a deterrence justification of the principle of aggravated harm. The extent of this support can

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86. *But see* note 72 *supra;* there may be increased deterrence for other reasons.

87. The discussion of motivation is concerned only with conscious motivation. Some commentators have raised the issue of unconscious motivation in various discussions of the criminal law. *See, e.g.*, Ryu, *Causation in the Criminal Law*, 106 U. PA. L. REV. 773, 798 (1958). Their discussions, to this author, are to little avail. In large part this is due to the poor state of the art—we know too little of unconscious motivation and even less of how to unearth and deal with it. Much like the issue of free will, "the practical business of government and administration of law is obliged to proceed on more or less rough and ready judgments, based on the assumption that mature and rational persons are in control of their own conduct." Gregg Cartage & Storage Co. v. United States, 316 U.S. 74, 80 (1942).

Prof. Packer argues for proceeding on the assumption that people are in control of their own lives because of the necessity of drawing a line beyond which coercive state intervention in a citizen's life is forbidden:

> Neither philosophic concepts nor psychological realities are actually at issue in the criminal law. The idea of free will in relation to conduct is not, in the legal system, a statement of fact, but rather a value preference having very little to do with the metaphysics of determinism and free will. The fallacy that legal values describe physical reality is a very common one. . . . But we need to dispose of it here, because it is such a major impediment to rational thought about the criminal law. Very simply, the law treats man's conduct as autonomous and willed, not because it is, but because it is desirable to proceed as if it were. It is desirable because the capacity of the individual human being to live his life in reasonable freedom from socially imposed external constraints (the only kind with which the law is concerned) would be fatally impaired unless the law provided a *locus poenitentiae*, a point of no return beyond which external constraints may be imposed but before which the individual is free—not free of whatever compulsion determinants tell us he labors under but free of the very specific social compulsions of the law.

H. PACKER, *supra* note 19, at 74-75.

88. *See* text of statute accompanying note 30 *supra.*

be gauged by distinguishing between those sequences of prohibitions for which it is highly unlikely that the occurrence of harm reflects on the intent or knowledge of the actor,[89] and those for which the principle acts as a surrogate knowledge requirement. An example of the latter is the larceny sequence,[90] where the distinction between grand and petit larceny is based not on the knowledge of the actor but on the market value of the goods stolen.[91] Although theoretically this is an example of the principle of aggravated harm, since the sanction an offender is exposed to may vary depending upon factors beyond his control,[92] this sequence is designed to serve a different function. Implicit in the sequence is the judgment that people have a rough idea of the value of things. The larceny sequence utilizes this judgment to simplify the prosecutor's task by replacing a knowledge requirement, which is difficult to prove, with an irrebuttable presumption that is easy to use.[93] Insofar as the judgment this sequence may rest upon is true—that people have a rough idea of the value of what they steal—marginal deterrence may be served by allocating more severe punishment to the individual who commits grand larceny. However, insofar as this judgment is true, the larceny sequence is not an example of the principle of aggravated harm at all, since the punishment to which an offender is exposed no longer depends upon factors beyond his control. To the extent it is not true, a deterrence justification for the principle of aggravated harm cannot be formulated, as we have seen.[94]

Similar problems exist for the relationship of the principle of aggravated harm to the moralizing or educative influence of the criminal law. To the extent that harm done is a reflection of moral culp-

89. The felony-assault sequence, note 29 *supra,* is a good example. Although I can present no empirical validation, I very much doubt that there are many who commit nonviolent felonies with the intent to do physical injury. Furthermore, if the occurrence of harm does not reflect an intent, then the principle of aggravated harm cannot be justified on the basis of deterrence. *See* notes 68-80 *supra* & accompanying text.

90. *See* text of statute accompanying note 28 *supra.*

91. *Id.*

92. For example, a person who shoplifts what he believes to be a $15 Spiro Agnew watch has committed grand larceny if it turns out that the watch is a $1,000 original.

93. *Cf.* Morissette v. United States, 342 U.S. 246, 263 (1951).

Prof. Schulhofer feels that the principle of aggravated harm could profitably be employed to raise a rebuttable presumption of dangerousness, as MODEL PENAL CODE § 201.2(1)(b), Comment (Tent. Draft No. 9, 1959) does. Schulhofer, *supra* note 33, at 1595-96. This would place the burden on the defendant who has committed a proscribed act with harmful results to show that he is not more dangerous than another who committed a similar act with less severe consequences (thus demonstrating that he is not deserving of a harsher sentence). Although an interesting idea, it obscures rather than clarifies the real issue—which is whether the relationship between harm and dangerousness justifies differential treatment.

94. *See* note 89 *supra.*

ability, relating harm to punishment may serve deterrence by impressing on the populace the direct relationship between moral culpability and the disutility of a proscribed act. This may serve to "educate" the populace as to the heinousness of more severe forms of criminality, thereby enhancing deterrence. But, in only a few sequences of sections is it likely that harm done actually reflects culpability,[95] and in those the principle of aggravated harm has been supplanted for reasons of expediency.[96] In short, the needs of deterrence are not served by the principle of aggravated harm.

There remains to be considered the relationship between the principle of aggravated harm and rehabilitation and incapacitation. Here it will not do to assume that the severity of harm is directly related to an offender's propensity to future criminality or his need of rehabilitation. If severity of harm is directly related to either, then the principle of aggravated harm serves both functions by relating the length of imprisonment to the severity of harm, thus lengthening the time during which the offender is subject to state control. This not only extends the period during which the offender is unable to recidivate but also expands the time available to treat him.[97] Hence, the issue now to be considered is whether the severity of harm resulting from a proscribed act indicates a person's need of treatment or restraint. More speci-

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95. The only other sequence than larceny in which this is likely is the unlawful use of slugs. *See* note 30 *supra.*

96. *See* notes 89-94 *supra* & accompanying text.

97. In fact, I am being too generous to the rehabilitative model, as the evidence suggests that there is a slight negative relationship between time served and success on release. *Hearings on Corrections, Federal and State Parole System Before Subcom. No. 3 of the House Comm. on the Judiciary,* 92d Cong., 2d Sess., ser. 15, pt. 7-A, at 224 (testimony of D. Gottfredson, Criminological Researcher) (1972). D. Jaman studied parole performances of persons committed for robbery or burglary in California, and concluded that the longer a person is held the greater is the chance that he will recidivate, even if the findings are adjusted to account for the fact that poorer parole risks are retained longer. D. Jaman, Parole Outcome and Time Served by First Releases Committed for Robbery and Burglary, 1965 Releases (California Department of Corrections, Measurement Unit, 1968). Robison and Smith concluded, based on Jaman's data, that "regardless of which 'treatments' are administered while . . . [an offender] is in prison, the longer he is kept there the more he will deteriorate and the more likely is it that he will recidivate." Robison & Smith, *The Effectiveness of Correctional Programs,* 17 CRIME & DELIN. 67, 72 (1971). *See also* D. GLASER, THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM 301-04 (1964); G. KASSELBAUM, D. WARD, & D. WILNER, PRISON TREATMENT AND PAROLE SURVIVAL: AN EMPIRICAL ASSESSMENT 177 (1971). This is not to say that rehabilitative techniques could not be developed or implemented so that the length of incarceration would be inversely proportional to the possibility of recidivism, but it is to say that apparently that is not now the case. In fact, extending imprisonment for rehabilitative purposes is probably counter-productive, leaving incapacitation as the only serious argument for the principle of aggravated harm.

fically, the issue is whether the severity of harm is related to the chance of recidivism of the offender.[98]

The investigation of the relationship between severity of harm and recidivism is beset by a difficult problem that should be noted at the outset. The investigation must be empirical to yield satisfactory results, since we are now testing the assumptions we have proceeded upon. Yet, there have been no empirical studies of the narrow issue of the relationship of the severity of harm resulting from a proscribed act and recidivism. There have been serious investigations of two related areas, however, that shed some light on the problem. These two areas are the attempts to develop predictive technologies able to gauge an offender's chance of success on parole, and the likelihood that an offender will engage in violent criminality upon release. Although the work done in these areas will not unequivocally dispose of the contention that severity of harm is a predictor of recidivism, it will demonstrate the dubiousness of it.

First, parole prediction. In response to criticisms directed at the procedural inadequacies of the parole process[99] and the exercise of discretion within its decision-making process,[100] the U.S. Board of Parole recently promulgated the Guidelines for Decision-making.[101] The ostensible purpose of the Guidelines is to provide a rational and objective method of exercising discretion in parole release decision-making.[102] One component of the Guidelines is the Salient Factor Score, which is designed to predict the likelihood that an offender will succeed on

98. That the issue can be appropriately narrowed to this is clear if two points are noted. First, the desires or motivation of the offender as demonstrated by the severity of harm (or by anything else) are not directly relevant to rehabilitation or incapacitation, although whatever insights motivation may yield into the offender's propensities are. However, we need not go through the logical chain of harm implying motivation which in turn implies propensities. The concern is with any relationship for whatever reasons between harm and propensities, and that issue will be studied directly. Second, although the word "rehabilitation" conceivably could convey more than the attempt to return an offender to society as a functioning member, the word usually refers to the process of resocialization. *Compare* N. MORRIS, *supra* note 54, at 26 *with* N.Y. CORREC. LAW § 136 (McKinney 1935).

99. *See* Kastenmeir & Eglit, *Parole Release Decision Making: Rehabilitation, Expertise, and the Demise of Mythology,* 22 AM. U.L. REV. 477 (1973); Comment, *Curbing Abuse in the Decision to Grant or Deny Parole,* 8 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 419 (1973).

100. *See* Note, *Judicial Application of Procedural Due Process in Parole Release and Revocation,* 11 AM. CRIM. L. REV. 1017 (1973); Comment, *supra* note 99.

101. For a thorough account of the Guidelines history, see Project, *Parole Release Decision Making and the Sentencing Process,* 84 YALE L.J. 810, 822 nn.58-60 (1975) (hereinafter cited as Project).

102. *See* Gottfredson, Hoffman, Sigler & Wilkins, *Making Paroling Policy Explicit,* 21 CRIME & DELIN. 34 (1975).

parole. The Salient Factor Score is used in conjunction with the Offense Severity Index[103]—a fairly subjective ranking of the seriousness of particular crimes[104]—to determine the approximate first release date of an offender.

Although the operation of the Guidelines is not of interest for our purposes, the Salient Factor Score is, as it is designed to discriminate between those who will succeed and fail on parole.[105] In developing the Salient Factor Score, researchers attempted to isolate the factors that best discriminated between those who would succeed and those who would fail on parole.[106] Nine characteristics were determined to be of value in making parole prognosis. After further testing, the predictive power of the Salient Factor Score was believed sufficient to recommend implementation.[107] Of the nine characteristics found to be of predictive value, not one referred to the severity of the harm caused by the offender.[108] In other words, severity of harm was not found to predict recidivism. If severity of harm is not correlated with recidivism, then extending the length of imprisonment based solely upon the harm done cannot be justified on grounds of insuring "the public safety by preventing the commission of offenses through . . . the rehabilitation of those convicted and their confinement when required in the interests of public protection."[109]

The Parole Board's work does not dispose of the issue entirely. The Board was not directly interested in the relationship between harm and

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103. For a discussion of the Guidelines Offense Severity Index, and of the mechanics of the Guidelines, see Project, *supra* note 101, at 822-928. The Guidelines are published in 28 C.F.R. §§ 2.1-.57 (1974).

104. *See* P. Hoffman & J. Beck, Parole Decision-Making: A Salient Factor Score, Apr. 1974 (U.S. Bd. of Parole Res. Unit: Rep. 2).

105. *Id.* at 2-3. "Failure" was defined as a new conviction resulting in a sentence of at least 60 days, a return to prison for parole violation, or an outstanding warrant. *Id.*

106. *Id.* at 13.

107. *Id.*

108. The Salient Factors are: (1) number of prior incarcerations; (2) age at first commitment; (3) whether the crime involved auto theft; (4) prior negative experience on parole or probation; (5) history of drug abuse; (6) high school degree or equivalent; (7) verified private employment or full time school attendance for at least six months in last two years in community; (8) number of prior convictions; (9) and release plan to live with spouse or children. 28 C.F.R. § 2.20, at 73 (1974).

Due to the other component of the Guidelines—the Offense Severity Scale—there is a relationship between the subjective severity of the crime and length of time served. The Offense Severity Scale is not part of the Guidelines because of its predictive value; rather, its function is to accommodate the Guidelines to the subjective evaluations of the seriousness of offenses that are held by Parole Board members. P. Hoffman, J. Beck & L. DeGostin, The Practical Application of a Severity Scale, June 1973 (NCCD Parole Decision-Making Project Supp. Rep. 13).

109. N.Y. PENAL LAW § 1.05(5) (McKinney 1975).

recidivism—the scope of the study was much broader.[110] Furthermore, the mere fact that the Parole Board does not think severity of harm indicates the likelihood of recidivism does not prove the two are unrelated. Clearly, the importance of the Board's work lies not in what it proves, but in what it suggests—which is that the principle of aggravated harm cannot be justified on the grounds of incapacitation or treatment of likely recidivists.[111]

The clinical attempts to predict violent criminality support the position that severity of harm is not related to the chance of recidivating, though admittedly the corroboration is weak. The efforts of the clinicians have been directed towards developing techniques that allow valid predictions of future violent criminality to be made. The one point on which all agree is that it is difficult, if not impossible, to pre-

110. There may be some who would argue that the breadth of the study makes it of little value in determining a much narrower issue—that often too much knowledge is worse than too little. *Cf.* Dershowitz, *Preventive Disbarment: The Numbers are Against It,* 58 A.B.A.J. 815, 819 (1972).

111. California has engaged in a similar attempt at parole prediction. The California Youth and Adult Corrections Agency employs a base expectancy table composed of twelve factors to predict the likelihood of success on parole. As with the U.S. Board of Parole's Salient Factor Score, the California base expectancy table does not include any reference to the harm done by the individual. *See* McGee, *Objectivity in Predicting Criminal Behavior,* 42 F.R.D. 192 (1968).

Yet another attempt at predicting parole success comprises part of the work of the Patuxent Institution of Maryland. Created by statute, the Defective Delinquent Act, MD. ANN. CODE art. 31B, § 5 (1951), one of the institutional purposes is to confine and treat "defective delinquents." "Defective delinquent" is defined as an individual "who, by the demonstration of persistent aggravated antisocial or criminal behavior evidences a propensity toward criminal activity, and who is found to have either such intellectual deficiency or emotional imbalance, or both, as to clearly demonstrate an actual danger to society." *Id.* at § 5. These individuals should be treated until such time as it is "reasonably safe for society to terminate confinement and treatment." *Id.* For an account of the operation of Patuxent, *see* Sas v. Maryland, 334 F.2d 506 (4th Cir. 1964); Carney, *The Indeterminate Sentence at Patuxent,* 20 CRIME & DELIN. 135 (1974). Once a person is confined to Patuxent as a defective delinquent, the institution is not to release him until convinced that it is safe to do so. The resources at its command are described in Director of Patuxent Institution v. Daniels, 243 Md. 16, 221 A.2d 397, *cert. denied,* 385 U.S. 940 (1966). Notwithstanding these resources, which allow Patuxent to engage in therapy with patients as well as attempt to predict the chance of success on release, the Institution has apparently not been very successful in discriminating between those who will and will not succeed. *See generally* Schreiber, *Indeterminate Therapeutic Incarceration of Dangerous Criminals: Perspectives and Problems,* 56 VA. L. REV. 602 (1970). *But see* Hodges, *Crime Prevention by the Indeterminate Sentence Law,* 128 AM. J. PSYCHIATRY 291 (1971).

For a collection of other attempts at developing a predictive technology, see Project, *supra* note 101, at 872 n.308. For a discussion of the best known of these—the Glueck scale for the prediction of juvenile delinquency—see Prigmore, *An Analysis of Rater Reliability on the Glueck Scale for the Prediction of Juvenile Delinquency,* 54 J. CRIM. L.C. & P.S. 30, 31 n.11 (1963); Voss, *The Predictive Efficiency of the Glueck Social Prediction Table,* 54 J. CRIM. L.C. & P.S. 421 (1963).

dict dangerousness,[112] and that the most sophisticated techniques are called for:

> Dangerousness seems to be a result of multiple forces. It cannot be attributed to a single factor, and it is not detectable through routine psychiatric examination. There is no single test for it.[113]

Although the clinical studies did not examine the specific relationship of severity of harm and recidivism, and were concerned with predicting one relatively rare species of recidivism, still they do imply that the relationship between the two, given present knowledge,[114] is inadequate to justify increased periods of imprisonment on the basis of harm if the purpose to be served is incapacitation or rehabilitation.[115]

That severity of harm is irrelevant to the determination of a sentence imposed for purposes of rehabilitation and incapacitation is not universally accepted, however. Relying more on intuition than analysis, various commentators have defended the relevance of the principle of aggravated harm to a determination of the risk a person created and thus to the determination of an appropriate sanction based, in part, upon considerations of rehabilitation and incapacitation.[116]

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112. One research team has concluded that valid predictions of dangerousness can be made. Kozol, Boucher & Garofalo, *The Diagnosis and Treatment of Dangerousness,* 18 CRIME & DELIN. 371 (1972). Most commentators believe to the contrary. *See* N. MORRIS, *supra* note 54, at 62-73; Diamond, *The Psychiatric Prediction of Dangerousness,* 123 U. PA. L. REV. 439 (1974).

113. Kozol, Boucher & Garofalo, *supra* note 112, at 383. For other studies of dangerousness see Steadman & Halfon, *The Baxstrom Patients: Backgrounds and Outcomes,* 3 SEMINARS IN PSYCHIATRY 376 (1971); Steadman & Keveles, *The Community Adjustment and Criminal Activity of the Baxstrom Patients: 1966-1970,* 129 AM. J. PSYCHIATRY 304 (1972); Wenk, Robison & Smith, *Can Violence Be Predicted?,* 18 CRIME & DELIN. 393 (1972).

114. As I have pointed out elsewhere, our predictive capacity is most likely improving, and the time may not be far away when the difficult issue of preventive detention will have to be faced squarely. Allen, Book Review, 73 MICH. L. REV. 1517, 1528 (1975).

115. This conclusion is supported by two interesting studies done by Franklin Zimring in Chicago. One study compared fatality rates in knife and gun attacks. Zimring, *Is Gun Control Likely to Reduce Violent Killings?,* 35 U. CHI. L. REV. 721 (1968). The other compared fatality rates in attacks with guns of various calibers. Zimring, *The Medium is the Message: Firearm Caliber as a Determinant of Death from Assault,* 1 J. LEGAL STUDIES 97 (1972). Essentially, what he found was that the fact of death resulting from an assault is not a "complete" indicator of the seriousness of the assault. As he said in the latter study, "whatever else may separate fatal from nonfatal firearm attacks, the element of chance must play an important role . . . [and there] is a strong suggestion that most people who attack with guns act in ways that are distinguishable only on the basis of result." *Id.* at 110-11.

116. *See, e.g.,* F. ALLEN, *supra* note 32, at 19; Packer, *The Model Penal Code and Beyond,* 63 COLUM. L. REV. 594, 598 (1963). The Temporary Commission apparently felt similarly: "The seriousness of the crime is an indication of the public's need for protection and of the offender's need for control." *Commission Staff Notes, supra* note 5, at 276 (footnote omitted).

Professor Schulhofer recently articulated the basis for this intuitive judgment. In a discussion of "arguments that seek to relate actual harm to the dangerousness of the offender or his offense, a factor that may be relevant . . . to decisions concerning the need for isolation and treatment of the offender,"[117] he said:

> The validity of the dangerousness theory is in one sense clear. Suppose we group together all those whose conduct appears to have created the same risk, so far as this risk can be estimated on the basis of actions alone, and then divide this group into two classes—one consisting of those who have caused harm and the other consisting of those who have not. It is statistically inevitable that those who have caused harm will on the average have created higher risks, in terms of circumstances of which they should have been aware, than those who did not cause harm. The harmful result thus . . . . confirms the dangerousness of conduct so difficult to evaluate that we would otherwise be reluctant to condemn it.[118]

But, this position cannot withstand analysis. More importantly, although elucidating the logical error that this argument entails will not demonstrate the empirical validity of any proposition concerning the principle of aggravated harm, it will demonstrate that the intuitive position cannot be maintained, thus leaving the principle of aggravated harm without support.

Schulhofer's argument that the occurrence of harm differentiates among those who created higher and lower risks, far from being "statistically inevitable," rests upon circular reasoning—it begs the question by assuming what is to be proved. The argument can be reduced to the following: if there is a class of similar but not identical acts, X and X′ being representative of the class, whose occurrence precipitates in every case either result A or result B, then it is "statistically inevitable" that those who engage in act X, resulting in A, "will on the average have created higher risks, in terms of circumstances of which they should have been aware,"[119] of the occurrence of A, than those who engage in X′ resulting in B. This follows, however, only if what the argument is attempting to prove is assumed to be true—that the occurrence of A indicates the relative chance of the occurrence of A created by act X as compared to X′. That is, that the occurrence of A is generally a result of an act that created a relatively higher risk

117. Schulhofer, *supra* note 33, at 1508.
118. *Id.* at 1589.
119. *Id.*

of A, viewed from the actor's perspective, than did a similar act resulting in B.

That assumption, however, may be contrary to fact. Whether X and X′ cause A or B may simply be fortuitous—a matter of nothing but chance. If that is the case, then the occurrence of A indicates only that a chance event has occurred. It most certainly does not necessarily indicate that the person committing act X resulting in A created a higher chance of A than did another who engaged in X′ with B the result.[120] Consider, for example, two individuals playing dice, one of whom throws the total of six, and the other throws snake-eyes. If the dice are evenly balanced and randomly distributed in each player's hand before he throws, the chance of each man totaling six is the same (as is the chance of throwing snake-eyes). The fact that the first man totaled six does not indicate that the chance of his throwing that total was higher than the second man's chance of throwing six; it simply indicates that a chance event occurred. In short, Professor Schulhofer's argument is valid only insofar as apparently similar events create disparate risks of harm, but that apparently similar events do create different risks of harm cannot be demonstrated as he attempts to do so.[121] Thus, the principle of aggravated harm can find little support in empiricism or rhetoric to buttress the contention that it serves the purposes of rehabilitation or incapacitation.[122]

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120. This is true regardless of what the chance of A occurring is. For example, event X may result in A 80% of the time and in B 20% of the time. But, two people engaging in X, in one case resulting in A and in the other in B, a priori create the same risk of A: 80%.

121. *But see* note 80 *supra*. The essence of Schulhofer's logical error is a failure to distinguish between one event being repeated an infinite number of times (*e.g.*, throwing one pair of dice an infinite number of times) and an infinite number of similar events, each occurring once (*e.g.*, throwing an infinite number of identical dice once each). This problem may also underlie Glanville Williams' well-known statement that "a would-be criminal who constantly fails is less dangerous than one who constantly succeeds." G. WILLIAMS, *supra* note 21, at 137. The truth of this depends upon what "constantly fails" and "constantly succeeds" mean, for, as Williams himself has said, "the danger is the same where the criminal's failure to complete is due only to chance." *Id.* at 136. *See also* Smith, *Element of Chance in Criminal Liability,* 1971 CRIM. L. REV. 63, 72.

122. Prof. Schulhofer asserts that "it is relevant to the grading of the offenses that those who did not cause harm had, as a class, created lower risks than those who did cause harm." Schulhofer, *supra* note 33, at 1589. He does not elaborate upon this assertion, however. In fact, he later seems to contradict himself: "Harm may, of course, be taken as an indication of the 'objective' dangerousness of the act itself, but it proves a very crude guide for this purpose, . . . and the dangerousness of the act is in turn only a crude guide to the potential dangerousness of the actor in the future." *Id.* at 1602 n.339.

III

The path that we have travelled in our examination of the relationship of the principle of aggravated harm and the legitimized justifications of punishment—deterrence, rehabilitation, and incapacitation—leads inescapably to the conclusion that none of the three adequately supports the principle, although an unadorned theory of retaliation does. This is not to say that the New York Legislature was embracing a retributive philosophy.[123] Perhaps it was simply follow-

123. Whether retribution ought to play a role in the criminal law is much disputed. In fact, the dispute has reached constitutional proportions. Furman v. Georgia, 408 U.S. 238 (1972). *Compare* 408 U.S. at 342-46 (Marshall, J., concurring) *with* 408 U.S. at 431 (Powell, J., dissenting).

The ways by which retribution has been defended are almost as rich as the literature is vast. *See* authorities cited in notes 19, 32, 47, 48 *supra;* Mabbott, *Freewill and Punishment,* in CONTEMPORARY BRITISH PHILOSOPHY, 3RD SERIES 289, 303 (H. Lewis ed., 2d ed. 1961):

> It is often thought that . . . the reform theory, is modern and humane compared with the retributive theory, which is primitive and barbaric. But the essential point about retributive punishment is that it treats the criminal as a man. . . . To be punished for reform reasons is to be treated like a dog. A sane adult demands to be held responsible for his actions.

Retributive punishment has been rejected by just as many, if not more, illustrious individuals as have embraced it. *See* authorities cited in notes 32, 41, 60 *supra. See also* AMERICAN CORRECTIONAL ASSOCIATION, MANUAL OF CORRECTIONAL STANDARDS 7-10 (3rd ed. 1966); O. HOLMES, THE COMMON LAW 42-46 (1881); J. MICHAEL & H. WECHSLER, *supra* note 35, at 10-20; H. PACKER, *supra* note 19, at 37-39.

The desire to rehabilitate rather than punish offenders has provided an important basis for rejecting retributive punishment. *See* K. MENNINGER, THE CRIME OF PUNISHMENT (1966); B. WOOTTON, *supra* note 32; Weihofen, *supra* note 45.. In fact, one can find preachers, if not practitioners, of rehabilitation as long ago as 1870. According to Jessica Mitford, the first Congress of the National Prison Association (now the American Correctional Association), meeting in 1870, passed a Declaration of Principles that contained, among other things, "the objective of 'moral regeneration' of the prisoner as opposed to 'infliction of vindicative suffering.'" J. MITFORD, KIND AND USUAL PUNISHMENT 33 (1973). This is not all that surprising in light of the fact that the present-day penitentiary is largely the result of 18th century reforms of the Pennsylvania Quakers who desired to substitute repentence and spiritual uplifting for the brutal treatment then accorded offenders. A secure place was needed for this, of course, both to keep those in need of change in and those who would be bad influences on the offenders out. Thus, the Walnut Street Jail of Philadelphia was opened in 1790—for all practical purposes, the first penitentiary. *See* N. MORRIS, *supra* note 54, at 3-5.

Finally, the work of H.L.A. Hart deserves mention. Hart's major contribution has been his attempt to reconcile the demands of justice with the expediency of utilitarianism. In large part this has been an attempt to demonstrate that the restrictions on punishment that inhere in retribution, such as the limitation of punishment to an offender for his offense, may also be embraced by utilitarianism. As he describes much of his own work: "A central theme of these essays is that it is not only within the framework of a retributive theory of punishment that insistence on the importance of these restrictions make sense; there are important reasons, both moral and prudential, for adhering to these restrictions which are perfectly consistent with a general utilitarian conception of the aim of punishment." H.L.A. HART, *supra* note 1, at 210. For an excellent collection of essays on the problems punishment raises, see THE PHILOSOPHY OF PUNISHMENT, *supra* note 32.

In the final analysis, when all inferences and reliance on "objective fact" are recog-

ing the advice of Justice Holmes that the law "should correspond with the actual feelings and demands of the community, whether right or wrong"[124] by deferring to an "obstinate sense of a difference"[125] held by the public[126] between similar acts with disparate results. This may have been done not solely out of a desire to "satisfy the craving [for revenge] . . . and thus avoid the greater evil of private retribution,"[127] but also in an attempt to avoid nullification of the law by officials and juries. Just as a failure to punish transgressors may lead to vengeance being satisfied outside the law, so too may penalties that are seen as too harsh lead to failures to prosecute or to convict.[128] A legislature that defers to popular retributive demands such as these does not necessarily adopt a retributive philosophy.[129] Still, whether the New York Legislature was embracing or deferring, the practical consequences are the same—retributive principles have been codified.

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nized for what they are, I think it clear that Brett's characterization of Kant's philosophy of punishment—that it "is an intuitive one, with which one can only either agree or disagree in the light of one's own intuitions. Other formulations of the retributive theory are likewise intuitive, and occasionally they take on a somewhat mystical tinge"—is an apt characterization of all philosophies of punishment. P. BRETT, AN INQUIRY INTO CRIMINAL GUILT 51 (1963), *cited in* G. DIX & M. SHARLOT, CRIMINAL LAW: CASES AND MATERIALS 221 (1973). This, of course, is largely a result of a rather obvious, but often overlooked, aspect of logical thought—all logical systems ultimately rest on assumptions and definitions ("intuition," or "moral judgments," if you will). *See* Mabbott, *Prof. Flew on Punishment,* in PHILOSOPHY OF PUNISHMENT, *supra* note 32, at 115, 120.

124. O. HOLMES, *supra* note 123, at 41. Not everyone concurs with Justice Holmes' "first requirement of a sound body of law," however. *See* H. WEIHOFEN, *supra* note 45, at 120; Schulhofer, *supra* note 33, at 1514.

125. H.L.A. HART & A. HONORE, CAUSATION IN THE LAW 355 (1959).

126. Whether the public in fact does have retributive desires is disputed by some, *see* note 45 *supra,* although there is a general consensus, not empirically validated to be sure, that it does. *See* MODEL PENAL CODE art. 5, Comment at 25 (Tent. Draft No. 10, 1960); F. ALLEN, *supra* note 32, at 50, 71; O. HOLMES, *supra* note 123, at 40; Smith, *supra* note 121.

127. O. HOLMES, *supra* note 123, at 41-42.

128. J. HALL, THEFT, LAW AND SOCIETY 96-101 (1935); H. KALVEN & H. ZEISEL, THE AMERICAN JURY (1966); Levine, *The New York Penal Law: A Prosecutor's Evaluation,* 18 BUFFALO L. REV. 269, 273 (1968-69); MICHAEL & WECHSLER, *supra* note 19, at 1267-68; Comment, *The Fallacy and Fortuity of Motor Vehicle Homicides,* 41 NEB. L. REV. 793 (1962).

129. As Michael and Wechsler put it:

> It may be true that the basis of the greater popular indignation when the result occurs than when it does not, the two instances of behavior being in all significant respects the same, is popular acceptance of the propriety of retaliation for the harm done. The psychology of the matter may, on the other hand, be more complicated than that. But even if it is not, the legislator or judge who takes account of the state of public sentiment as a means to avoiding nullification does not thereby embrace the popular theory.

MICHAEL & WECHSLER, *supra* note 19, at 1295 n.80. *See also* MODEL PENAL CODE §2.03, Comment at 134 (Tent. Draft No. 4, 1955).

This is also true of the justification of the principle that emerges from the conjoining of the Benthamite principle of frugality,[130] a recognition of our present lack of knowledge regarding the efficacy and necessity of particular sanctions,[131] and the "ideology of freedom"[132] that our society is founded upon. In deciding how to sanction individuals who have committed similar acts but with different results, if doubts exist whether a more or less punitive scheme best achieves the goals of punishment, the less punitive scheme may be adopted in order to maximize the personal freedom of the citizenry.[133] But, when this is done through the use of the principle of aggravated harm, freedom is maximized by way of codification of retributive principles.[134]

I must say, however, that it is one thing to analyze a body of law "[i]n an illusory atmosphere of complete rationality,"[135] but quite another to offer viable alternatives for the inconsistencies that are found. Here the issue is not only theoretical symmetry and technical feasi-

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130. J. BENTHAM, *supra* note 66, at 170 (footnote omitted):

> The general object which all laws have, or ought to have, in common, is to augment the total happiness of the community; and therefore, . . . to exclude, as far as may be . . . mischief.
>
> But all punishment is mischief: all punishment in itself is evil. Upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil.

See also id. at 194.

131. *See* notes 61-65, 99-115 *supra* & accompanying text.

132. Ryu, *Contemporary Problems of Criminal Attempts,* 32 N.Y.U.L. REV. 1170, 1174 (1957); Ryu, *supra* note 87, at 796-97.

133. Maximizing freedom in this manner may run afoul of another important tenet of our society—the principle of equality. *See* MICHAEL & WECHSLER, *supra* note 19, at 1297-98; Schulhofer, *supra* note 33, at 1562-85.

134. Freedom could have been maximized and reliance on retributive principles minimized, had the Legislature completely rejected the principle of aggravated harm and related penalties to factors subject to the control of the actor. For example, rather than let the distinction between grand and petty larceny rest solely on market values, the Legislature could additionally require knowledge or intent as to value. This could be done by defining grand larceny as the knowing or intentional taking of another's property of a value of more than $250. Moreover, sequences of statutes of this sort are by no means alien to the Penal Law. Compare the following sequences of sections: § 150.15 to §150.20 (second and first degree arson); § 175.05 to § 175.10 (second and first degree falsifying business records); § 175.30 to § 175.35 (second and first degree offering a false instrument for filing); § 200.10 to § 200.12 (second and first degree bribe receiving); § 200.20 to § 200.22 (second and first degree rewarding official misconduct); § 200.25 to § 200.27 (second and first degree receiving reward for official misconduct); § 205.20 to § 205.25 (second and first degree promoting of prison contraband); § 220.06 to § 220.09 to § 220.18 to § 220.21 (criminal possession of a controlled substance in the sixth, fifth, second and first degrees); § 220.16 to § 220.18 (third and second degree criminal possession of a controlled substance); § 220.39 to § 220.43 (third and first degree criminal sale of a controlled substance); § 235.05 to § 235.06 (second and first degree obscenity). N.Y. PENAL LAW (McKinney 1975).

135. Note, *The Proposed Penal Law of New York,* 64 COLUM. L. REV. 1469, 1558 (1964).

bility, but political practicality as well.[136] A penal law must reconcile the often inconsistent demands of the people it affects as well as the various theories of punishment. The New York Penal Law may be a compromise among these various demands and theories that recognizes "that there must be an element of retribution or expiation in punishment: but that so long as that element is there, and enough of it is there, there is everything to be said for giving the punishment the shape that is most likely to deter and reform."[137] Nevertheless, the only satisfactory explanation of the principle of aggravated harm is that it serves to satisfy retributive notions of punishment.

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136. Thus, for example, the principle of aggravated harm, and its concomitant punishment ranges, facilitates plea bargaining. Judge Sobel raises this issue, although in a different context, in his article, *supra* note 5, at 259. It is clear that the principle of aggravated harm was, to some extent, employed because the Commission thought the Legislature would demand it. Consider the following portion of an interview with Richard Denzer, The Executive Director of the Commission, discussing the felony murder rule, found at note 29 *supra*:

> [Interviewer]: Did you ever consider abolishing the felony murder rule entirely?
>
> Denzer: During the initial discussions of the Commission, some thought it might be a good idea. However, the majority of the Commission thought otherwise.
>
> . . . .
>
> [Interviewer]: Who deserves the greater penalty—a man who is part of an accident during a robbery or a man who goes out and intends to commit a murder?
>
> Denzer: Now you're raising a philosophical problem, that is, how much of a part should result play in determining the punishment for a crime. . . . [W]e tried to be realistic in terms of what the community was ready to accept. Therefore, we struck a balance and permitted the result to play its part.
>
> [Interviewer]: What do you mean by "community"? Not the man on the street who has never heard of the felony murder rule?
>
> Denzer: The Legislature of New York. . . .

This conversation is reported in Schwartz & Skolnick, *Drafting a New Penal Law for New York: An Interview with Richard Denzer,* 18 BUFFALO L. REV. 251, 260-61 (1968-69).

137. Asquith, *The Problem of Punishment,* THE LISTENER, May 11, 1950, at 821, *quoted in* J. HALL, *supra* note 21, at 304 n.26.